#1206
Rec'd 3/23/2022

In the Matter of Arbitration Between the	:	Grievance Number: DOT-2020-00770-07
	:	
STATE OF OHIO, DEPARTMENT OF TRANSPORTATION,	:	
	:	Grievant: Randall Lisk
Employer	:	
	:	
and the	:	
	:	Arbitration Hearing Date:
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 11, AFL-CIO,	:	January 26, 2022
	:	
	:	Howard D. Silver, Esquire
Union	:	Arbitrator

DECISION AND AWARD OF THE ARBITRATOR

APPEARANCES

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PROCEDURAL BACKGROUND

This matter came on for a remote arbitration hearing on January 26, 2022 at 9:00 a. m. via the teleconferencing platform Zoom. During the hearing both parties were afforded a full and fair opportunity to present evidence and arguments in support of their positions. The arbitration hearing concluded on January 26, 2022 at 11:35 a. m. and the evidentiary portion of the hearing record was closed at that time.

The arbitrator received post-hearing written arguments from both parties by February 25, 2022 and the arbitrator exchanged the post-hearing briefs between the parties on February 25, 2022.

This matter proceeds under a collective bargaining agreement between the parties in effect from May 12, 2018 through February 28, 2021, Joint Exhibit 1.

No challenge to the arbitrability of the grievance has been raised.

Based on the language of the parties' collective bargaining agreement, the arbitrator finds the grievance at issue herein to be arbitrable and properly before the arbitrator for review and resolution.

JOINT ISSUE

Did the Employer violate Article 1.05 on February 14, 2020 when the exempt supervisor Shannon Slavin did not notify the grievant of an accident and handled the accident report herself?

JOINT STIPULATIONS OF FACT

1. The grievant became the District 10 Safety & Health Inspector 1 on September 12, 2010[.]
2. The grievant's supervisor, Shannon Slavin, became the District 10 Safety & Health Program Consultant on February 22, 2015.
3. On February 14, 2020 an accident occurred in ODOT District 10 and the grievant's supervisor conducted the accident investigation.

JOINT EXHIBITS

1. Contract between the State of Ohio and OCSEA/AFSCME Local 11; May 12, 2018 – February 28, 2021

2. Grievance Trail
   (a) Snapshot

3. Safety & Health Inspector Classification Specifications

4. Safety & Health Consultant Classification Specifications

5. ODOT District 10 Accident Report Data May 12, 2018 – February 28, 2021

6. ODOT District 10 Injury Report Data May 12, 2018 – February 28, 2021

STATEMENT OF THE CASE

The parties to this arbitration proceeding, the State of Ohio, Department of Transportation, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining agreement that was in effect from May 12, 2018 through February 28, 2021, Joint Exhibit 1. Within this collective bargaining agreement is Article 1, Recognition. Within Article 1 is section 1.05, Bargaining Unit Work, which reads as follows:

> 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.

The grievant in this proceeding, Randall Lisk, during all times relevant to this proceeding, worked from a classified position titled Safety and Health Inspector 1, class number 24431, a job title in effect since March 26, 1990. Mr. Lisk was originally hired by ODOT effective December 28, 1992.

The classification specification for Safety and Health Inspector 1 describes a position that operates from within a bargaining unit for which the Union is the exclusive representative, the bargaining unit covered by the parties' collective bargaining agreement, Joint Exhibit 1. A Safety and Health Inspector 1 operates at a full performance level, requiring knowledge of governmental regulations and departmental guidelines that bear on safety, health, and fire inspections, namely how such inspections are to be conducted, of living conditions, work sites, equipment/vehicular accidents, personal accidents, injuries and incidents, or a combination thereof. A Safety and Health Inspector 1 is expected to recommend corrective action within an assigned district(s) or institution or single state agency. See Joint Exhibit 3, Classification Specification for Safety and Health Inspector series, Class Concept for Safety and Health Inspector 1.

The job duties listed for Safety and Health Inspector 1 on the second page of Joint Exhibit 3, the classification specification for the Safety and Health Inspection series in which Safety and Health Inspector 1 appears, are presented in order of importance. These duties begin with inspecting living conditions, work sites, equipment/vehicular accidents, personal accidents, injuries, and incidents or any combination thereof, in an institution or district or one state agency for safety, health, and fire hazards, determining whether there has been compliance with governmental regulations and departmental

guidelines, and making recommendations for corrective action.

The above referenced duties are followed by conducting training meetings and preparing inspection and investigation reports and other materials for presentation at hearings, committee meetings, or court proceedings. These duties are followed by duties relating to analyzing data to discover trends.

The grievant's immediate supervisor, Shannon Slavin, works from a position classified Safety and Health Program Consultant, Job Code 24443, a job title in effect since July 26, 1998. The position Safety and Health Program Consultant operates outside the bargaining unit, being a supervisory position not controlled by the parties' collective bargaining agreement.

The position Safety and Health Program Consultant within its class concept describes a second advanced level position, requiring thorough knowledge of fire safety, safety, health, and building codes, laws, and regulations pertaining to developmental centers and community facility operations in order to serve in a consultative capacity to an institution, administrators, and fire safety personnel regarding methods and alternatives of compliance with applicable safety, health, fire safey, and building regulations and standards or, in the Ohio Department of Transportation, develop, review, and implement health and safety policies and procedures, advise Ohio Department of Transportation employees regarding industry and environmental health and safety issues, develop and expand safety programs, and evaluate the effectiveness of programming in an assigned district or from within the central office.

The duties listed for Safety and Health Program Consultant at page four (4) of seven (7) of the classification specification for the Safety and Health Coordinator series are presented in order of importance. These duties begin with advising departmental and developmental center administrators and safety and fire safety personnel regarding methods and alternatives of compliance with applicable safety, fire safety, health and building codes and other national or consensus codes, laws, and

regulations related to safety and accident and fire prevention. These duties include receiving and analyzing reports of safety inspections by regulatory agencies and evaluating developmental centers to determine compliance with departmental rules and policies. Reference is also made in these duties to making recommendations to improve compliance, identify programs and policies that need revision, and inform parties of methods of compliance.

A Safety and Health Program Consultant employed within the Ohio Department of Transportation may be called upon to develop a district safety program in an assigned district, review and implement health and safety policies and procedures, and serve as a consultant to district management personnel on safety and health issues. Other duties include advising district employees regarding industry and environmental health and safety issues, and developing and expanding safety programs. The duties then listed include evaluating the effectiveness of the safety program for an assigned district, followed by the duties: "... conducts accident investigations to ensure implementation of safe work and vehicle operation practices, makes determination of fault &/or negligence & recommends discipline & suspension of ODOT driving/operator privileges if necessary."

Other duties listed subsequent to the above responsibilities include receiving, monitoring, and analyzing reports, developing departmental policies, procedures, and administrative rules regarding safety, fire safety, security, and other loss prevention and control measures. These duties are followed by assigning and monitoring the work of personnel assigned to assisting with the Department's safety and security programming.

The grievant, Randall Lisk, became ODOT's District 10 Safety and Health Inspector 1 on September 12, 2010. See Joint Stipulation 1.

The grievant's supervisor, Shannon Slavin, became ODOT's District 10 Safety and Health Program Consultant on February 22, 2015. See Joint Stipulation 2.

On February 14, 2020, an accident occurred in ODOT District 10 and the grievant's supervisor,

Ms. Slavin, conducted the accident investigation. See Joint Stipulation 3.

On March 5, 2020 a grievance was directed to the Employer by the Union, grievance number DOT-2020-00770-07. The grievance filed on March 5, 2020 referred to the accident that had occurred on February 14, 2020. The grievant is identified in the grievance as Randall Lisk, a Safety and Health Inspector 1 who has, as a primary duty, the inspection/investigation of vehicular accidents and injuries. The grievance complains that on February 14, 2020 Safety and Health Inspector 1 Lisk "... was not notified until 4:19 of the accident, in which he asked to report to but Shannon Slavin told him she was doing it..." The grievance complains that this is happening more and more, where the Safety and Health Program Consultant does not notify the Safety and Health Inspector 1 that there is bargaining unit work to be done but instead performs bargaining unit work herself, performing bargaining unit work that ought to have been assigned to a bargaining unit member.

The March 5, 2020 grievance seeks a remedy that includes a cease and desist order, directing the Employer to stop having a supervisor perform bargaining unit work, work that should be performed by a bargaining unit member, in this case, the grievant. The remedy sought through the grievance also asks that the grievant be made whole.

The grievance was considered by the parties in accordance with their agreed grievance procedures presented in Article 25, but the grievance remained unresolved. The grievance was directed on to final and binding arbitration by the Union.

SUMMARY OF TESTIMONY

Randall Lisk

The grievant in this case, Randall Lisk, began serving as a Safety and Health Inspector 1 in ODOT's District 10 on September 12, 2010. Mr. Lisk's immediate supervisor at that time had been Barbara Mayle. Ms. Mayle retired in 2014. Shannon Slavin became Mr. Lisk's direct supervisor on

February 22, 2015, from a position titled Safety and Health Program Consultant.

Mr. Lisk recalled in his testimony at the arbitration hearing that when Supervisor Mayle was notified of an accident requiring an inspection and/or investigation, Supervisor Mayle would notify Mr. Lisk as the only Safety and Health Inspector 1 assigned to the district, to investigate the accident and provide a report of the information gathered through the investigation. Mr. Lisk recalled that the only time Supervisor Mayle responded directly to an accident was when Mr. Lisk had been off.

Mr. Lisk explained that with the change from Ms. Mayle's supervision to Ms. Slavin's supervision, 90% and later 80% of the accident investigations were assigned to Mr. Lisk in his role as District 10's Safety and Health Inspector 1. Mr. Lisk recalled that notice of an accident to be inspected/investigated was not always promptly transmitted to Mr. Lisk.

Mr. Lisk explained that most of the injury reports now come from Supervisor Slavin rather than from the bargaining unit position intended to perform such work. Mr. Lisk referred to Union Exhibit 3, pages 38-39, showing fifty-three (53) injury reports from January 2017 to April 2018, with eighteen (18) reports from Safety and Health Inspector 1 Lisk, and thirty-five (35) filed by Safety and Health Program Consultant Slavin. In this regard Mr. Lisk referred to Joint Exhibit 6, pages 23-24, showing eighty-five (85) injury reports filed from May 2018 to February 2021 of which Supervisor Slavin conducted sixty-eight (68) and bargaining unit member Kisk conducted nine (9). Mr. Lisk also referred to Union Exhibit 3 that reports, from June 2021 to December 2021, Supervisor Slavin filed sixteen (16) injury reports and Safety and Health Inspector 1 Lisk filed three (3).

Mr. Lisk noted that late notice about an accident scene interferes with how the job is to be done. Mr. Lisk stressed the importance of being notified promptly when an accident has occurred so as to gather better information about what occurred and to better protect employees. Mr. Lisk emphasized the importance of seeing the scene of the accident in conducting an investigation.

Mr. Lisk referred to Union Exhibit 6, page 50, a September 29, 2021 email from Supervisor

Slavin to Safety and Health Inspector 1 Lisk. The email reads:

> Randy,
>
> I wanted to let you know that Mike Fogle had an injury today. He was not seriously injured, but he did go to the dr. I've got everything taken care of already and you don't need to complete anything. I just wanted to keep you in the loop.
>
> Thank you.
>
> Shannon Slavin
> Safety & Health Program Consultant
> ODOT District 10

Mr. Lisk testified that on February 14, 2020 at 2:45 p. m. an accident was reported to Supervisor Slavin as having occurred. When this report had been received by Supervisor Slavin, Mr. Lisk had been on duty and located in his office. Mr. Lisk's shift on February 14, 2020 concluded at 3:30 p. m. and it did so that day without notice of the accident being transmitted to Mr. Lisk. At 4:19 p. m. on February 14, 2020 Mr. Lisk, while off duty, received notice of the accident from his supervisor. Mr. Lisk offered to respond to the accident scene but was told that that would not be necessary.

Under questioning by the Employer's representative, Mr. Lisk recalled that the February 14, 2020 accident had involved three (3) injured employees. Mr. Lisk was referred to Management Exhibit 3, page 33, presenting ODOT District 10 Accident and Injury Data from May 12, 2018 through February 28, 2021. This data sheet reports 464 total accidents and injuries, with ninety-three (93) completed by a supervisor and twenty (20) occurring while Mr. Lisk was on leave. Mr. Lisk confirmed that he is assigned few injury investigations.

Under redirect questioning by the Union's representative, Mr. Lisk stated that he could handle five (5) to seven (7) accident reports per day and noted that injury investigations are to be assigned a higher priority. Mr. Lisk confirmed that he has done multiple accident and injury investigations on the same day.

Mr. Lisk stated that Article 1, section 1.05 of the parties' collective bargaining agreement prohibits decreasing bargaining unit work, a prohibition of longstanding in the parties' collective bargaining history.

Brian Brown

Brian Brown is the Chief of ODOT's Human Resources Office, responsible for labor relations, employment development, and employee health and safety. Mr. Brown began his employment with ODOT on March 1, 2004. Mr. Brown subsequently moved to a supervisory position and now finds himself heading the human resources department of this large executive Ohio agency.

Mr. Brown referred to the classification specifications for Safety and Health Inspector 1 and Safety and Health Program Consultant. Mr. Brown noted in his testimony that both classification specifications refer to conducting inspections and investigations and therefore present overlapping duties that either job title is authorized to perform.

POSITIONS OF THE PARTIES

Position of the Union

The Union understands the issue to be decided in this case is whether the Employer violated Article 1.05 of the parties' collective bargaining agreement on February 14, 2020.

The Union notes that the duties of a Safety and Health Inspector 1 are clearly defined in the classification specification that attaches to this bargaining unit job title. Also clearly delineated in the classification specification attaching to the job title Safety and Health Program Consultant are the duties of the position filled by the grievant's immediate supervisor, a position not located in the bargaining unit.

The Union refers to express language in Article 1.05 that states: “Supervisors shall not increase

and the Employer shall make every reasonable effort to decrease the amount of bargaining unit work done by supervisors." The Union notes that this provision of the parties' Agreement had been included in prior collective bargaining agreements, comprising long-standing agreed language between the parties.

The Union points to the class concept for Safety and Health Program Consultant in the classification specification for this job title, a summary listing of duties that includes developing, reviewing, and implementing health and safety policies and procedures; advising ODOT employees regarding industry and environmental health and safety issues; developing and expanding safety programs and evaluating their effectiveness in an assigned district from ODOT's central office. The Union points out that the class concept serves to differentiate one position from another, expressing the primary focus of the duties presented in the classification specification.

The Union contends that Supervisor Slavin violated Article 1.05 by increasing the amount of bargaining unit work being done by a supervisor when Supervisor Slavin conducted inspection/investigation duties as her primary work, thereby eroding the bargaining unit work available to the bargaining unit.

The Union emphasizes that the classification specification for Safety and Health Inspector 1 states that the most important duties assigned to a position with this job title, as indicated in the order in which the duties are presented, are the conduct of safety, health, and fire inspections of work sites to identify safety hazards. These duties also include conducting or monitoring safety and health inspections, vehicular accident investigations, personal accidents, injuries, and incidents, or any combination thereof.

The Union points out that the classification specification for Safety and Health Program Consultant was open to amendment in 2005 and again in 2019. The Union argues that had the Employer intended that a Safety and Health Program Consultant have as a primary duty the conduct of

safety, health, and fire safety inspections/investigations, such a change could have occurred, but did not.

The Union notes that Supervisor Slavin had not worked as a Safety and Health Inspector 1 previously and therefore had not previously been assigned bargaining unit work to perform. The Union asserts that the inspections/investigations conducted by Supervisor Slavin were not bargaining unit work previously performed by a supervisor but a new, unwarranted incursion into bargaining unit work by a non-bargaining unit employee.

The Union points out that there was no emergency or other reason on February 14, 2020 to withhold the accident investigation from the grievant. The call came in at 2:45 p. m. at a time when the grievant had been in his office and available for the assignment, but notice of the accident from Supervisor Slavin was not provided to the grievant until 4:19 p. m., leaving Supervisor Slavin to handle the inspection/investigation. The Union also refers to the injury investigations conducted in District 10, almost all of which had been conducted by Supervisor Slavin, with very few injury investigations assigned to the grievant. The Union argues that those actions serve to erode the bargaining unit work available to bargaining unit members.

The Union refers to the decision and award issued by Arbitrator Mitchell Goldberg in the matter of arbitration between the State of Ohio and the Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO, grievance number 31-2(2/15/12)2-01-07, a grievance brought by District Union Steward Michael J. Danko on March 15, 2012, decided by Arbitrator Goldberg on April 29, 2013. The Union notes that the Danko arbitration addressed Safety and Health Inspector 1 and Safety and Health Program Consultant, and referred to the classification specifications for each job title as tangible, setting out in black and white the duties assigned to each. Arbitrator Goldberg referred to Article 1.05 at page thirteen of his decision and award as a “job security clause” that protects the Union and its members “... from having their identified work and worker numbers eroded by assigning the work to

supervisors." Arbitrator Goldberg also points out at page thirteen of his decision and award that: "Their work is described in the job descriptions that, as Arbitrator Keenan explained, control and govern their duties and responsibilities."

The Union points out that Arbitrator Goldberg issued a cease and desist order to the Employer requiring the Employer to stop assigning Safety and Health Inspector 1 duties to supervisory or managerial employees.

The Union emphasizes that while inspections/investigations of work sites, accident scenes, and injuries in District 10 are primary duties of a Safety and Health Inspector 1, these duties are not primary duties of a Safety and Health Program Consultant. The Union argues that the duties assigned to each job title are distinguishable from one another, with the primary duties of a Safety and Health Inspector 1 comprising bargaining unit work, while the primary duties of a Safety and Health Program Consultant are supervisory and administrative in nature. The Union contends that in comparing primary duties between the two job titles there is no overlap and no reason for the supervisory classification to be performing bargaining unit work that is to be assigned to a bargaining unit position.

The Union argues that to allow the supervisor of the grievant to continue to perform bargaining unit work is to allow the Employer to continue to violate Article 1.05 of the parties' Agreement.

The Union urges the arbitrator to sustain the grievance, issue a cease and desist order directing the Employer to stop having bargaining unit work performed by non-bargaining unit employees, and make the grievant whole.

Position of the Employer

The Employer understands the joint issue statement to be whether the Employer violated Article 1.05 on February 14, 2020 when the exempt supervisor did not notify the grievant of an accident and handled the accident report herself. In this regard the Employer notes that the grievant served within

District 10 from a bargaining unit position, while supervisor Slavin worked from an exempt position. The Employer claims that the duties described in the classification specification for Safety and Health Inspector 1, a bargaining unit position, are similar to duties presented in the classification specification for Safety and Health Program Consultant, an exempt position. The Employer points out that as a supervisor, the Safety and Health Program Consultant retains the right to assign work to the Safety and Health Inspector 1.

The Employer denies that it violated Article 1.05 and asserts that the Union has failed to present evidence proving that the Employer's actions eroded the bargaining unit. The Employer points out at page 2 of its post-hearing brief: "Article 1.05 focuses on the **amount** of bargaining unit work being done by the supervisor rather than how many times the supervisor performed the duties." (Emphasis in original).

Also at page 2 of the Employer's post-hearing brief the Employer points to language in Article 1, section 1.05 that allows a supervisor to perform the same duties assigned to a bargaining unit position "... when the classification specifications provides that the supervisor does, as a part of his/her job, some of the same duties as bargaining unit employees." The Employer asserts that both parties agree that there is an overlap of certain duties, duties shared by a Safety and Health Inspector 1 and a Safety and Health Program Consultant, as presented in their respective classification specifications. These shared duties include "conducting accident investigations" and conducting and coordinating "... administrative inquiries or investigations of major unusual incidences such as resident and/or employee injuries or deaths..." The Employer contends that because the supervisor is expressly empowered to perform certain duties assigned to a bargaining unit position by language in Article 1, section 1.05, the supervisor's actions in this regard cannot constitute a violation of Article 1, section 1.05.

The Employer emphasizes that express language in Article 1, section 1.05 restricts its effect to the term of the parties' collective bargaining agreement by presenting as the second sentence in the

second paragraph of Article 1, section 1.05: " During the life of the 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."

The Employer notes that the collective bargaining agreement applicable to this proceeding was in effect from May 12, 2018 to February 28, 2021, and anything occurring outside these three years that comprise the "life of the Agreement," are outside the timelines intended by agreed language in the parties' Agreement.

The Employer contends that the Union has failed to substantiate an increase in bargaining unit duties being performed by supervisors. The Employer claims that the Union has offered no evidence on the actual time spent on accident and injury investigations. The Employer argues that without such data no conclusions can be reached about how much of the bargaining unit work is being performed by supervisors and whether that amount reflects an increase in the amount of bargaining unit work being done by supervisors.

The Employer reminds the arbitrator that the burden of proof on all of the issues referenced above rests squarely on the Union. This evidentiary burden requires that a preponderance of evidence be presented to the hearing record proving that the Employer's actions served to erode the bargaining unit. The Employer argues that no such proof has been presented by the Union and therefore the grievance should be denied in its entirety.

DISCUSSION

The classification specifications for Safety and Health Inspector 1 and Safety and Health Program Consultant describe the duties assigned to each job title. It is true that both classification specifications reference conducting accident investigations, but it is also true that the duties presented in each classification specification are presented in the order of their importance, with duties presented

first assigned the highest importance, and less important duties presented further down in the listing of duties.

The classification specification for Safety and Health Inspector 1 presents as its first duty: "Inspects the living conditions, work sites, equipment, vehicular accidents, personal accidents, injuries & incidents or combination thereof..." These inspections/investigations, according to this classification specification, are to identify safety, health, and fire hazards, determine whether there is compliance with governmental regulations and departmental guidelines, and make corrective action recommendations.

The classification specification for Safety and Health Program Consultant has presented as its first duty:

> In Department of Transportation (i.e. ODOT), develops district safety program in assigned district (i.e. only one position per district), develops, reviews & implements health & safety policies & procedures, serves as consultant to district management personnel on safety & health issues, advises district employees regarding industry and environmental health & safety issues, develops & expands safety programs & evaluates effectiveness for assigned district.

Following the above language in the classification specification for Safety and Health Program Consultant there is presented: "... conducts accident investigations to ensure implementation of safe work & vehicle operation practices, makes determination of fault &/or negligence & recommends discipline & suspension of ODOT driving/operator privileges if necessary."

The positioning of the conduct of accident investigations in each classification specification shows this endeavor to be a primary duty of a Safety and Health Inspector 1, and a duty of less importance to a Safety and Health Program Consultant. A first and primary duty of a Safety and Health Inspector 1 is inspection/investigation of accidents, injuries, and incidents involving fire, health, or safety hazards. A Safety and Health Program Consultant is to perform accident investigations to ensure

implementation of safe work and vehicle operation practices. Beyond this specified circumstance for a Safety and Health Program Consultant to conduct an accident investigation, the parties' collective bargaining agreement through Article 1, section 1.05 presents additional limitations on when a supervisor may perform bargaining unit work.

Article 1, section 1.05 refers expressly to "bargaining unit work" but provides no definition for this term. The arbitrator understands "bargaining unit work" to include those job responsibilities assigned to a job title that operates from within the bargaining unit. In this case "bargaining unit work" means the work assigned to the bargaining unit position Safety and Health Inspector 1. The duties assigned to this bargaining unit job title comprise bargaining unit work, and this work remains "bargaining unit work" even when being performed by a supervisor.

It should be remembered that the classification specifications that describe the job duties assigned to job titles are the unilateral work product of the Employer. The Employer has been extended this authority by express language in the Management Rights Article in the parties' Agreement, Article 5, which reserves to the Employer the right to determine the work assignments of employees.

The classification specification tells us what duties may be expected from a job title and it may include a description of the circumstances under which the enumerated duties are to be performed. For example, duties are required to be performed from a position in ODOT, or are to be performed for a particular purpose, or are to be done in a specific context.

The parties' collective bargaining agreement is not the unilateral work product of one party or the other but language to which both parties have agreed. It is this meeting of the minds in producing the parties' Agreement that bestows their contract with its power, and is the reason it is considered the highest authority in resolving the grievance. The arbitrator's authority to act in this case is solely and exclusively grounded in the express language of the parties' collective bargaining agreement. The parties' Agreement, in Article 25, section 25.03, empowers the arbitrator to enter a final and binding

decision and award in resolving the grievance, but limits the arbitrator's authority to disputes involving the interpretation, application, or alleged violation of a provision of the parties' Agreement. This provision makes it clear that the arbitrator has no authority to add to, subtract from, or modify any of the terms of the parties' Agreement, nor is the arbitrator to impose on either party a limitation or obligation not specifically required by the expressed language in the parties' Agreement.

The arbitrator therefore understands the agreed, expressed language in the parties' collective bargaining agreement to be an authority in this case superior to the classification specifications for the job titles. When both can be implemented as written, that is the best course. However, when the language of the parties' Agreement conflicts with language in the classification specifications, the language of the parties' Agreement is viewed as the higher authority based on the fact that it is grounded in mutual promises made by both parties as expressed in the parties' collective bargaining agreement. As such, the parties' Agreement is entitled to deference as a superior authority.

Beyond the circumstances expressed in the classification specifications under which enumerated duties are to be performed, the language of the parties' Agreement also intends that expressed limitations be applied as to when the performance of bargaining unit work by non-bargaining unit workers is to be allowed.

Article 1, section 1.05 in its initial paragraph expresses a promise by the Employer that supervisors will not increase, and the Employer will make every reasonable effort to decrease, the amount of bargaining unit work done by supervisors.

The second paragraph of Article 1, section 1.05 reiterates that no increase will occur in the bargaining unit work being performed by supervisors and again presents the Employer's promise to make every reasonable effort to decrease the amount of bargaining unit work being done by supervisors.

The third paragraph in Article 1, section 1.05 reads as follows:

> 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 part of his/her job, some of the same duties as bargaining unit employees.

The third paragraph of Article 1, section 1.05 presents the agreed circumstances under which supervisors may perform bargaining unit work. These circumstances include emergencies, providing relief, providing training, avoiding the imposition of mandatory overtime, providing coverage so others may be off, or to cover for no shows. The last circumstance presented in this part of Article 1, section 1.05 refers to a classification specification for a supervisory position that has as part of the supervisor's job some of the same duties as bargaining unit employees. As noted above, the classification specification for Safety and Health Program Consultant does have within it a reference to conducting accident investigations, bargaining unit work and a primary duty of a Safety and Health Inspector 1. It is not presented as a primary duty in the classification specification for Safety and Health Program Consultant.

As the arbitrator has noted above, the expressed language in the parties' Agreement is entitled to be applied as an authority of the first order, even when conflicting with classification specifications. The arbitrator must therefore recognize as enforceable all of the language in Article 1, section 1.05, including the language about overlapping duties in classification specifications for the two job titles at issue.

The fourth paragraph of Article 1, section 1.05 provides that in the absence of an emergency circumstance, overtime opportunities for work normally performed by bargaining unit employees shall first be offered to those bargaining unit employees who normally perform the work before it may be

offered to non-bargaining unit employees.

The fifth and final paragraph of Article 1, section 1.05 expresses the Employer's recognition of the integrity of the bargaining unit and expresses the Employer's promise to refrain from taking any action for the purpose of eroding the bargaining unit.

The grievance in this case refers to an incident that occurred on February 14, 2020 beginning at 2:45 p. m. when a report was directed to Supervisor Slavin of an accident that would call for an inspection/investigation, at a time when the grievant was at his assigned office, on duty, and available to carry out the responsibilities of his position as a Safety and Health Inspector 1 in District 10. The grievant's shift was scheduled to conclude at 3:30 p. m.

When Supervisor Slavin received the notice of the accident on February 14, 2020 the grievant was not notified of the accident nor assigned the responsibility of inspecting and/or investigating the accident scene. Instead, notification of the accident was kept from the grievant until after the conclusion of his assigned shift and a supervisor, Ms. Slavin, performed the bargaining unit work necessitated by the accident. None of the circumstances enumerated in the classification specifications or in Article 1, section 1.05 have been shown to have been present among the facts of this case, no emergency, no avoidance of mandatory overtime, etc., except for the circumstance referenced in Article 1, section 1.05 about a supervisor's classification specification providing that the supervisor, as part of the supervisor's job, is to perform some of the same duties as bargaining unit employees.

The classification specification for Safety and Health Program Consultant does refer to conducting accident investigations, bargaining unit work, and therefore presents one of the exceptions listed in Article 1, section 1.05 under which a supervisor is allowed to perform bargaining unit work.

The arbitrator, however, is also mindful of the other promises made in the language of Article 1, section 1.05, expressed language in the parties' Agreement that is also entitled to enforcement. On no less than three separate occasions in the expressed language of Article 1, section 1.05 the Employer

promises to make every reasonable effort to decrease the amount of bargaining unit work being performed by supervisors, recognizes the integrity of the bargaining unit, and promises to take no action to erode the bargaining unit.

One way to erode the bargaining unit is to reduce the amount of bargaining unit work available to the bargaining unit. Less opportunity to be assigned bargaining unit work means less of a need for bargaining unit employees. Fewer bargaining unit employees needed can translate into a smaller bargaining unit, a bargaining unit that has been eroded.

The circumstances proven to have occurred on February 14, 2020 may reflect a supervisor performing bargaining unit work because of the language of the supervisor's classification specification, but there is nothing in these facts that reflects any kind of reasonable effort to insure that bargaining unit work is assigned to bargaining unit members. The accident reported at 2:45 p. m. on February 14, 2020 to Supervisor Slavin was an accident that produced bargaining unit work, bargaining unit work that is to be assigned to bargaining unit members, as intended by the expressed language of Article 1, section 1.05. The grievant was on duty and available to perform bargaining unit work from his bargaining unit position but the assignment was withheld from the bargaining unit member and performed by a supervisor, with no ostensible reason for doing so. If every reasonable effort is intended to be made to reduce the bargaining unit work being done by supervisors, the actions of Supervisor Slavin on February 14, 2020 would appear to conflict with the Employer's expressed promises in Article 1, section 1.05.

The Employer has emphasized the authority of a supervisor to perform bargaining unit work based on an overlap of duties in classification specifications but has presented no reason why, on February 14, 2020, the supervisor did not act in accordance with the Employer's promises to limit, through every reasonable effort, the amount of bargaining unit work being performed by a supervisor. There was no stated reason for withholding this bargaining unit work from a bargaining unit member,

only the unilateral decision by a supervisor to retain it for herself, for reasons unexplained in the hearing record. Without some explanation for this action on the part of the supervisor, the decision appears to have been an arbitrary one, subject only to the preference of the supervisor. Such action contradicts the Employer's promises about recognizing the integrity of the bargaining unit and an intention to reduce the amount of bargaining unit work by supervisors through every reasonable effort.

The arbitrator understands a supervisor may be empowered to carry out bargaining unit work under the language of the classification specification of the supervisor's position. The arbitrator cannot find however that such bargaining unit work performance is allowed when such action directly contradicts other promises made by the Employer in expressed provisions in Article 1, section 1.05. The actions of the supervisor on February 14, 2020 may have been contemplated by the classification specification for Safety and health Program Consultant, but these actions nonetheless violated obligations expressed in the language of Article 1, section 1.05.

A violation of Article 1, section 1.05 is found to have been proven by a preponderance of the evidence in the hearing record. The grievance is sustained. Sustaining the grievance requires fashioning an appropriate remedy to heal the breach of the parties' Agreement.

There is no indication in the hearing record of a monetary loss suffered by the grievant. The grievance did not allege a back pay issue or refer to any restoration of benefits. The grievance in this case was about insuring that when bargaining unit work is assigned it is assigned to available, appropriate bargaining unit employees. By prevailing in this grievance the Union is entitled to the remedy it has sought from the filing of the grievance, a cease and desist order directing the Employer to stop having bargaining unit work performed by a supervisor when bargaining unit employees are available to perform the bargaining unit work.

AWARD

1. The grievance that has given rise to this arbitration proceeding is found by the arbitrator, under the language of the parties' collective bargaining agreement, to be arbitrable and properly before the arbitrator for review and resolution.

2. The failure to assign bargaining unit work to an available and appropriate bargaining unit member on February 14, 2020 violated express language in Article 1, section 1.05 about making every effort to decrease bargaining unit work being performed by supervisors.

3. The grievance is sustained.

4. The Employer is ordered to cease and desist in having supervisors perform bargaining unit work when agreed, special circumstances are not present and there is an appropriate bargaining unit member available to perform the bargaining unit work.

Howard D. Silver

Howard D. Silver, Esquire
Arbitrator
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Columbus, Ohio
March 23, 2022

CERTIFICATE OF SERVICE

I hereby certify that duplicate originals of the Decision and Award of the Arbitrator in the Matter of Arbitration Between the State of Ohio, Department of Transportation and the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, grievance number DOT-2020-00770-07, Grievant: Randall Lisk, were directed in electronic form to the following this 23rd day of March, 2022:

Gail Lindeman
Assistant Administrator of Labor Relations
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Gail.Lindeman@dot.ohio.gov

and

Mykal L. Riffle
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Columbus, Ohio
March 23, 2022