ARBITRATION DECISION NO.:
280

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Department of Mental Health,
Oakwood Forensic Center

DATE OF ARBITRATION:

DATE OF DECISION:
July 27, 1990

GRIEVANT:
Marsha Bradford
Thomas Haithcock
Carol Cotterman

OCB GRIEVANCE NO.:
23-12-(90-02-08)-0179-01-09-06-13

ARBITRATOR:
Harry Graham

FOR THE UNION:
Linda K. Fiely

FOR THE EMPLOYER:
Rachel Livengood

KEY WORDS:
Layoff
Job Abolishment
Burden of Proof
Lack of Work

ARTICLES:
Article 1 - Recognition
§1.03-Bargaining
Unit Work
Article 18 - Layoffs
§18.01-Layoffs

FACTS:

On February 1, 1990, three employees from the Oakwood Forensic Center were notified that their positions would be abolished due to a reorganization of the facility and decline in patient population, resulting in a lack of work. The three positions to be abolished were Computer Operator 2, Delivery Worker 1 and Medical Laboratory Technologist 1. The relevant contract article for layoffs and job abolishments is Article 18

which incorporates Ohio Revised Code (RC), Sections 124.321-327 and Administrative Code (AC) 123:41-01 through 22.

UNION'S POSITION:

The union argued that under RC 124.321(D), it is the employer's burden to show that a lack of work exists for the classifications before abolishing them. The union asserted that while the employer filed a statement of rationale with the Department of Administrative Services (DAS) stating that the abolishments were the result of a lack of work, it failed to show by a preponderance of the evidence that a lack of work actually existed. Although the employer provided documentation showing a reduction in the client population, it must show a comparison of the workload before and after the change in the facility. The union contended that the work within the three soon-to-be abolished positions had actually increased as a result of the reduction in patient population.

The union further argued that following the abolishments the employer distributed the duties of the laid-off employees to management persons and employees whose classifications do not allow them to perform such duties. Finally, the union felt that the documentation supplied by the employer to DAS was insufficient to make a proper evaluation of the proposed layoffs.

EMPLOYER'S POSITION:

The employer argued that only DAS can evaluate whether a lack of work exists and that a subsequent review by an arbitrator of the amount of work is inappropriate. The employer asserted that it does not have the burden of proving the layoffs were justified. The employer stated that since Oakwood has changed its focus from a long term facility to that of a short term, the number of residents has declined drastically while the staff has not declined proportionately. Consequently, the employer argued a lack of work existed.

The employer contended that supervisors and other employees are only performing the former duties of the abolished employees in de minimus amounts. Therefore, concluded the employer, no erosion of the bargaining unit existed as a result of the layoffs.

ARBITRATOR'S OPINION

The arbitrator held that DAS is not the exclusive evaluator of a lack of work and that it is proper for an arbitrator to consider whether a lack of work exists and whether the abolishment was proper. The arbitrator found that it is necessary for the employer to make a comparison between the amount of work being performed by the grievants when they were laid off and the work performed by them in the past. The employer's documentation showing a decline in patient population is insufficient to show that a lack of work exists. The arbitrator found that in fact the work load of the laid off employees had increased due to change in the facility's focus to short term care. While the total number of patients in the facility had decreased, there was a greater turnover of patients causing more administrative work.

The arbitrator found the employer's redistribution of the grievant's former job duties to be an erosion of the bargaining unit. The arbitrator concluded that the employer before it abolishes any positions it must: 1) have sufficient documentation to support its rationale for the layoffs and, 2) must demonstrate that the tasks once performed by those laid off are not improperly being performed by other members of the bargaining unit or supervisory personnel. Consequently, the arbitrator found the employers abolishment of positions was in violation of the Contract.

AWARD

The grievances of the three abolished employees are sustained. They are to be reinstated as if they were not laid off and are to receive all pay and benefits they would have received but for their layoff.

TEXT OF THE OPINION:

In the Matter of Arbitration

Between

OCSEA/AFSCME Local 11

and

The State of Ohio,
Department of Mental Health

Case No.:
23-12-900208)-0179-01-09-06-13

Before:
Harry Graham

Appearances:

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Introduction:

Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. Post hearing briefs were filed in this dispute. They were exchanged by the Arbitrator on July 14, 1990 and the record was closed on that date.

Issue:

The parties do not agree upon the precise formulation of the issue in this controversy. It is clear to all concerned that the issue to be determined is whether or not the Employer violated the Agreement when it abolished three positions at the Oakwood Forensic Center. If the Agreement was violated by that action, it must be determined what the proper remedy should be.

Background:

The State of Ohio operates a facility for treatment of mentally ill prisoners known as the Oakwood Forensic Center. As will be more fully set forth below the population of that facility has declined substantially during the past ten years. In response to that development staff at the Center has declined as well. On February 1, 1990 three employees at the Center, Marsha Bradford, a Computer Operator 2, Thomas Haithcock, a Delivery Worker 1 and Carol Cotterman, a Medical Laboratory Technologist 1 were notified that their positions would be abolished on May 18, 1990. In order to protest the pending discharges grievances

were filed. Prior to final determination of those grievances the appointed date arrived and the discharges were effected. The grievances filed protesting them were denied at all steps of the procedure and the parties agree that they are now properly before the arbitrator for determination on their merits.

Position of the Union:

At Article 18 the Collective Bargaining Agreement concerns itself with layoffs. It provides that layoffs will be made pursuant to the Ohio Revised Code, Sections 124.321-327 and Administrative Rule 123:-41-01 through 22. In the opinion of the Union the layoffs at Oakwood are not in compliance with the those sections of the Code and Administrative Rules.

Section 124.321(D) of the Code provides that at appointing authority must file a statement of rationale together with supporting documentation with the Director of the Department of Administrative Services prior to sending the layoff notice to the effected employees. Pamela Hyde, the Director of the Department of Mental Health notified the Department of Administrative Services that the layoffs were being sought due to a permanent lack of work at the facility. The Union takes the view that this represented a statement, without supporting rationale. The State must demonstrate that a lack of work exists. It is insufficient to assert there is a lack of work due to a change in the average daily resident population (ADRP) and a change in the function of Oakwood to a short term, acute care facility. In Esselburne v. Ohio Department of Agriculture 49 Ohio App. 3d 37 41 (1988) the Court was of the view that the Employer's burden of demonstrating a lack of work exists in a layoff situation may be met by providing statistical comparison data. The data submitted by the State in this situation does not meet that test according to the Union. In support of its position justifying the layoffs the State submitted various graphs. They were macro in nature, showing the population and staff of Oakwood. They were not specific with respect to the job classifications at issue in this proceeding. Consequently, they cannot be used to support the discharges in the Union's opinion. In fact, the work of the grievants is not directly related to the ADRP at Oakwood. Rather, it is more heavily affected by admissions, discharges, and readmissions, all of which have not declined to the extent of ADRP. In order for the State to support the layoffs specificity with respect to the amount of work performed by the Grievants is required. It is lacking in the opinion of the Union. Esselburne enunciates the proposition that there must be a comparison of workload before and after the layoffs. That was not done by the State in this case. Hence, the layoffs were improper and should be overturned according to the Union.

In Bispeck v. Trumbull County 37 Ohio St. 3d 26 (1988) the Ohio Supreme Court determined that a layoff ostensibly done to increase economy and efficiency could not demonstrate that result had occurred as a result of the layoff. The Employer could not cite specific day to day functions of the job abolished. That is the case in this dispute as well. Management at Oakwood was able to testify to general features of the positions and its opinion they were redundant. It could not testify as to the day to day tasks performed by the Grievants in detail in the Union's opinion. The State could not meet its burden of proof in this situation to support the layoffs. Hence, the Grievants should be reinstated to employment the Union asserts.

More specifically, the Union points to the workload being performed by the Grievants immediately prior to their layoffs. Marsha Bradford's workload did not decrease due to the decline in ADRP. To the contrary, her work increased. This was due to the increase in admissions and discharges attendant upon Oakwood's change to a short term, acute care facility. She had to enter and retrieve data from the computerized data system with each admission, discharge and readmission. As these actually increased, her workload did as well. Ms. Bradford's duties were assumed by Nikki Musto, a Mental Health Technician 1. That act eroded the bargaining unit as performance of such work is beyond the scope of her classification specification as maintained by the State. She is to be involved with therapy, not data entry. As Ms. Musto is performing tasks not associated with her position but rather duties performed by her ex-colleague, it must be concluded that the bargaining unit has been improperly eroded, violating Section 1.03 of the Agreement. Furthermore, the Administrative Code at Section 123:1-17-16 provides that employees of the State are to be assigned duties appropriate to their classifications. That has not occurred in this case. In addition, Wayne Smith, a Mental Health Administrator 1 and Ms. Bradford's supervisor is completing bed census and morning reports formerly performed by her. He is obviously doing bargaining unit work.

With respect to Tony Haithcock the Union claims that the State has not met its burden of showing his workload had decreased. To the contrary, documentation on the record indicates that the amount of mail to and from Oakwood has increased. In addition, the increase in admissions and discharges has increased the workload in his position as mail has to be forwarded with greater frequency than if the population is stable. Mr. Haithcock's supervisor was not consulted about his termination. Upon learning of it he was adamantly opposed. Since Mr. Haithcock has been terminated the mail room is open fewer hours per day. Internal policies require it be open from 10:30-11:30 daily. It is not meeting this standard. Patients have complained. The Union questions whether or not the facility is in compliance with an order of a United States District Court concerning patient rights at Oakwood.

Since Mr. Haithcock has become less available (he is on part-time status) supervisors have been picking up and delivering mail. This certainly serves to erode the bargaining unit and is a clear-cut violation of the Agreement in the Union's opinion.

No evidence is on the record that Carol Cotterman's workload as Medical Laboratory Technologist has decreased as a result of the decline in ADRP. To the contrary, as the number of admissions has increased, her workload has increased, not decreased. Each admittee must have blood drawn. Ms. Cotterman does that. A rise in admissions means more work for her, not less. At the arbitration hearing the State was of the view that her tasks could be performed by part-time staff. No evidence to that effect is on the record. Consequently the Union claims her discharge to have been improper.

Section 18.01 of the Agreement references the Ohio Revised Code at Section 124.321(D). The Code requires that the appointing authority, in this case Pamela Hyde, Director of the Department of Mental Health, file a statement of rationale and supporting documentation with the Director of Administrative Services prior to sending layoff notice to employees. She did not do so. No supporting documentation was furnished by Ms. Hyde in her request for layoff. Consequently, the Department of Administrative Services could not evaluate the merit of her request. As that is the case, the Union urges the grievances be sustained and all grievants returned to full time status with the State in addition to appropriate back pay being provided to them.

Position of the Employer:

As does the Union, the State points to the Labor Agreement in support of its position in the discharge in question in this proceeding. After reminding the Arbitrator of the contractual limitations on his authority the State points to certain sections of the Ohio Revised Code. Sections 124.321(A) establish that the appointing authority may abolish positions in accord with the Code and the rules of the Director of the Department of Administrative Services. Section 124.321(E) permits the Director of DAS to promulgate rules for determining lack of work within an appointing authority. The rules promulgated by DAS are referenced at Chapter 123:1-41 of the Administrative Code. Chapter 123:1-41-02(B) indicates that the Director of DAS shall determine whether a lack of work exists and which classifications will be affected by a layoff. According to the State, only the Director of DAS may determine if a lack of work exists. He examined the rationale provided by the Department of Mental Health and approved the layoffs. No authority exists for this or any other arbitrator acting under the Collective Bargaining Agreement to review the determination of the Department of Administrative Services.

Nothing in the Labor Agreement indicates that the Employer bears the burden of proving a layoff was justified. Any review of these layoffs on their merits exceeds the authority granted the Arbitrator by the Agreement and should not occur according to the State.

Should it be determined that a review of the layoffs on their merits is appropriate, the State urges they be found proper under the Agreement. Oakwood Forensic Center has changed its focus from long term to short term care. Consequently, the number of residents has declined precipitously. Staff has not declined proportionately. Thus, at the start of the 1980's the staff/patient ratio was 2.7 to 1. Ten years later it is 4.7 to one. This data establishes that the layoff was justified due to lack of work in the State's view.

With respect, to Marsha Bradford, the State indicates that her supervisor is doing the tasks she once performed only when a member of the bargaining unit is unavailable. In any operation a small amount of

bargaining unit work inevitably is performed by supervisors. No erosion of the bargaining unit is occurring by any of Ms. Bradford's tasks that might be done by her supervisor according to the State.

Concerning Tony Haithcock, it is the State's view that mail and supplies are being picked up and delivered in an efficient manner. That determination is inherently one that belongs with management according to the State. The work formerly done by Carol Cotterman is being performed to the satisfaction of the administration of Oakwood by a part-time position. It is being done by a person who works twenty hours per week. That staff member is able to cope with the work load without difficulty. To direct that a full time employee, Ms. Cotterman, perform it is absurd according to the State.

Discussion:

The initial claim of the State, that as the Ohio Revised Code and various administrative rules permit the Director of the Department of Administrative Services to layoff arbitral review is inappropriate, must be rejected. The Ohio Supreme Court in Bispeck v. Trumbull County Board of Commissioners 37 Ohio St. 3d 26 (1988) was confronted with an analogous claim. In Bispeck the Court observed that:

The General Assembly, in enacting R.C. 124.03(A) gave the Board (State Personnel Board of Review) broad powers in reviewing final decisions of the appointing authorities. By providing that the Board may affirm, disaffirm or modify the decisions of the appointing authority relative to layoff the General Assembly has authorized the Board to disaffirm layoff orders not only where it finds that the appointing authority acted arbitrarily, unreasonably or unlawfully, but also where it finds from an independent review of the layoff that the decisions made and actions taken by the appointing authority regarding the layoff of employees were improper or unnecessary. (Quoting State, ex rel. Ogan)

The Court went on to hold that while the State Personnel Board of Review may not substitute its judgement for that of the appointing authority it has the authority to "determine from the evidence presented to it" whether the abolishment in question was "arbitrary, unreasonable, or unlawful and whether the abolishment was proper and necessary." In the circumstances of this case the word "arbitrator" should be substituted for the word "board." That is, it is an arbitrator who is authorized to "determine from the evidence presented" whether the abolishment was proper.

In making such a determination it is appropriate to consider the guidance provided by the Court of Appeals for Franklin County in Esselburne v. Ohio Department of Agriculture 49 Ohio App. 3d 37 (1988). Esselburne sets forth the common sense proposition that in order to properly support abolishment of a position and the associated layoff it is necessary to compare the current work level in the position with the work level when lack of work did not exist. In making such comparison it is necessary to examine the evidence concerning the work levels before and after the layoff. The Court also directed that abolishment may not be accomplished by transferring the duties from a classified to an unclassified employee. With that standard in mind the evidence and introduced by the State in support of its action may properly be subject to examination.

The State submitted graphic evidence which demonstrates that the population of Oakwood has declined and that a commensurate decline of staff has not occurred as well. It is this fact upon which the State relies as the prime support for its action. When taking Esselburne into account that reliance is defective. It provides no information concerning the work load of the Grievants at the time they were laid off and their work load at some previous time when the State presumably considered them to be fully utilized. It is necessary that there be made a comparison between the amount of work being performed by the Grievants when they were laid off and the work performed by them in the past. Such a comparison is required in order to justify the layoffs under review in this proceeding. It is intuitively plausible to associate a decline in patient population at Oakwood with a reduction in need for personnel. What has not been demonstrated by the State is that it no longer has a need for the services of these particular personnel. To the contrary, testimony was received that indicated the Union's view that the decrease in patient population was associated with an increase in admissions and discharges. This led, according to the testimony of Union witnesses, to

increased, not decreased, work for the Grievants. Marsha Bradford, laid off from her position as Computer Operator 1 asserted that additional admissions and discharges resulted in more work for her as the person who entered patient data on the computerized record keeping system maintained by the Department. That testimony was not successfully rebutted by the Employer. Its assertions to the contrary were unsupported by any evidence specific to her position. Similarly, Joint Exhibit 28, showing postage expenditures at Oakwood, shows a drop between FY 1987 and 1988. Thereafter there is an increase in such expenditures. From FY 1989 through FY 1990 the increase was $1,000. Far from demonstrating that the duties of Tony Haithcock were diminishing with the decline in Oakwood's population the data indicate the reverse to be the case. Nothing is on the record to indicate the amount of mail handled by Mr. Haithcock diminished with the reduction in patient population. Viewed in the light cast by Esselburne it is apparent that the State has not demonstrated that the amount of work performed by Mr- Haithcock has declined. If anything, the reverse is true. Finally, with respect to Carol Cotterman, it may well be that the decline in patient population at Oakwood has rendered her continued services unnecessary. Such a conclusion would appear to be justified based upon the reduction of patients in the facility. But in order to support such a conclusion there must be some evidence to that effect on the record. Nothing exists by way of a daily record of procedures performed by her at some time in the past and the number of procedures done at the time of her layoff. It is insufficient support of a layoff action to assert that the amount of work performed has declined. That assertion must be supported by evidence. That evidence is conspicuously lacking with respect to the tasks performed by the three Grievants in this dispute.

At Article 1 , Section 1.03 the Agreement concerns itself with the integrity of the bargaining unit represented by the Union. In essence it provides that the Employer may not act in such a fashion as to erode the bargaining unit by improperly removing work from bargaining unit employees. According to testimony received at the hearing Marsha Bradford's tasks are now being performed by Nikki Musto. Ms. Musto is a Mental Health Technician 1. She is a health professional. The tasks associated with Ms. Bradford's duties are clerical in nature. They cannot be performed by Ms. Musto without improperly permitting her to perform tasks associated with Ms. Bradford's classification. To permit that to occur would be to sanction the sort of diminution of the bargaining unit the that parties agreed in Section 1.03 would not occur.

The same observation applies to Mr. Haithcock as well. To the extent that delivery of mail and supplies is now being performed by supervisory personnel the bargaining unit has been eroded.

This opinion should not be read to require that the State continue to maintain employees in its employee when the need for their services has ceased. It should be read to require the State to support a claim that it no longer requires the services of certain employees with recourse to data specific to their workload at some time previous to the layoff. That data should indicate that at the time the employee is laid off the amount of work they are performing has substantially diminished. Such a showing has not been made in this case as the general patient population data for Oakwood make no reference to the amount of work being performed by the Grievants prior to and at the time of their layoff. Similarly, in a layoff the State must demonstrate that the tasks once performed by those laid off are not improperly being performed by other members of the bargaining unit or supervisory personnel. If the State were to make such a showing with respect to some or all of these Grievants subsequent to receipt of this award a different result might obtain should they once again be laid off.

Award:

The grievances of Marsha Bradford, Tony Haithcock and Carol Cotterman are sustained. They are to be restored to employment as if they had not been laid off. They are to receive all pay they would have received but for their layoff. Such pay is to be made at the straight time rate. They are to receive all seniority credit they would have earned but for their layoff. All vacation and holiday pay that would have been earned by the Grievants but for their fayoff is to be paid to them.

Signed and dated this 27th day of July, 1990 at South Russell, OH.

Harry Graham
Arbitrator