ARBITRATION DECISION NO.:
390

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

EMPLOYER:
Bureau of Employment Services

DATE OF ARBITRATION:
August 15, 1991

DATE OF DECISION:
November 14, 1991

GRIEVANT:
Richard Svoboda
Nancy A. Simons
Carl Luebking

OCB GRIEVANCE NO.:
11-03-(90-09-26)-0100-01-09
11-05-(90-11-15)-0095-01-09
11-03-(90-10-04)-0101-01-09

ARBITRATOR:
David M. Pincus

FOR THE UNION:
Tim Miller
Steven W. Lieber

FOR THE EMPLOYER
Elliott Fishman, Advocate
Rachel Livengood,
Second Chair

KEY WORDS:
Layoff
Federal Law Pre-Emption
Arbitrability of Layoff Rationale
Broadview Arbitration Decision
Burden of Proof

ARTICLES:
Article 3 - Union Rights
§3.08-Information
Provided to the Union
Article 5 - Management
Rights

Article 18 - Layoffs
§18.01-Layoffs
§18.02-Guidelines
§18.03-Bumping in the Same Office, Institution or County
§18.04-Bumping in the Agency Geographic Jurisdiction
§18.05-Limits
§18.06-Geographic Divisions
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§18.08-Recall
§18.09-Re-employment
Article 25 - Grievance Procedure
§25.01-Process
§25.02-Grievance Steps
§25.03-Arbitration Procedures
§25.08-Relevant Witnesses and Information
Article 42 - Savings
Article 43 - Duration
§43.01-Agreement
§43.02-Preservation of Benefits

FACTS:

The federal government created a job training and counseling program and an employment program for veterans under title 38 United States Code 41-43. The program created federally funded Disabled Veterans' Outreach Specialists (DVOPS), and Local Veterans' Employment Representatives (LVERS) positions located within Ohio Bureau of Employment Services' offices. Hiring preferences established by federal law are: 1) qualified disabled Vietnam era veterans; 2) other qualified disabled veterans; and 3) any qualified veteran. The U.S. Department of Labor (DOL) negotiated with the OBES as to the number and location of the positions created. The parties agreed to relocate three positions from the Akron, Painesville, and Cincinnati offices, and reduce the total by one in the 1990 fiscal year. OBES implemented the changes in September 1990. This resulted in job abolishments and subsequent displacements of DVOPS and LVERS done according to federal law, but not in accordance with article 18 of the contract. Thus, the union grieved the personnel changes as a violation of the contract.

UNION'S POSITION:

A conflict does exist between article 18 of the contract and 38 U.S.C. 41-43 and Veterans' Program letters issued under that law. The arbitrator's authority is derived from the contract and non-conflicting state law, not federal law. Because Article 18 does not address Disabled Veterans, Outreach Specialists (DVOPS) and Local Veterans' Employment Representatives (LVERS) positions, state law controls. Title 38 U.S.C. 41-43, provides for hiring preferences according to the following criteria: 1) qualified disabled Vietnam veterans; 2) other qualified disabled veterans, and 3) any qualified veteran. However, this provision addresses hiring, not reductions, and thus does not supersede the contract. Additionally, the employer relied on program letters issued under federal law, not federal law itself. These letters do not carry the force of law and do not supersede the contract. Lastly, external law cannot alter the negotiated terms of the agreement between the

parties. For those reasons, the Broadview arbitration decision controls. The arbitrator has jurisdiction, under state law incorporated into the contract, to review the employer's layoff rationale.

EMPLOYER'S POSITION:

Title 38 U.S.C. 41-43 conflicts with article 18 of the contract. Federal courts have held that collective bargaining agreements are preempted by federal employment law. The federal statute created federally funded Disabled Veterans' Outreach Specialists (DVOPS) and Local Veterans' Employment Specialists (LVERS). Hiring preferences were created for veterans in this order; 1) qualified disabled Vietnam era veterans; 2) other qualified disabled veterans; and 3) any qualified veteran. Enforcement of this statute is accomplished through program letters which carry the force of law. Therefore, federal law, not state law or the contract, controls the layoff rationale regarding DVOPS and LVERS. The arbitrator has no authority to decide matters of federal law as arbitral authority is derived from the contract.

ARBITRATOR'S OPINION:

Title 38 U.S.C. 41-43 does conflict with article 18 of the contract. The statute creates Disabled Veterans' Outreach Program Specialists (DVOPS) and Local Veterans' Employment Specialists (LVERS). These positions possess preferences for hiring, recall, and layoff in the following order; 1) qualified disabled Vietnam veterans, 2) other qualified disabled veterans, and 3) any qualified veteran. The parties are empowered to negotiate a contract which conflicts with state law pursuant to the Ohio Revised Code section 4117, but are not permitted to make a contract in conflict with federal law. Additionally, contract provisions contrary to law are unenforceable under common law and an arbitrator cannot enforce a provision which conflicts with federal law. Therefore, federal law controls hiring and layoffs of those positions created and funded under such law and are not within the arbitrator's authority.

A different result is obtained when federal law does not preempt state law or the contract. The contract, and state law incorporated into it, control layoffs and job abolishments of positions created and funded by federal law. The arbitrator referred to the analysis found in the Broadview Layoff arbitration, #340. Layoffs are made pursuant to Ohio Revised Code section 124.321-.327. Other sections have been incorporated by contract section 43.02. Under the Ohio Revised Code employees had the benefit of review by the State Personnel Board of Review (SPBR). Under the contract, the arbitrator provides the review, previously performed by SPBR, through the grievance and arbitration process. The employer must prove by a preponderance of the evidence that the job abolishments serve the goals of economy and efficiency. Therefore, positions not created and funded by federal law are arbitrable.

AWARD:

The grievance was sustained in part. The DVOPS, and LVERS job abolishment were not arbitrable, however, the job abolishment which did not involve federal law were arbitrable. The employer failed to prove by a preponderance of the evidence that those job abolishment served economy or efficiency goals. The affected employee shall receive lost wages for the period which he was improperly reduced in position.

TEXT OF THE OPINION:

STATE OF OHIO AND OHIO
CIVIL SERVICE EMPLOYEES
ASSOCIATION LABOR
ARBITRATION PROCEEDING

IN THE MATTER OF THE
ARBITRATION BETWEEN

THE STATE OF OHIO,
BUREAU OF EMPLOYMENT SERVICES

-and-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, AFSCME, AFL-CIO.

GRIEVANCES:
Richard Svoboda,
Carl Luebking and
Nancy Simons

OCB Case Nos.:
11-03-(90-09-26)-0100-01-09,
11-05-(90-11-15)-0095-01-09 and
11-03-(90-10-04)-0101-01-09

ARBITRATOR'S OPINION AND AWARD

Arbitrator:
David M. Pincus

Date:
November 14, 1991

APPEARANCES

For the Employer
Deborah Connolly,
Labor Relations Representative
Dan Bloodsworth, Veterans
Employment Administrator
Carl Price, Assistant Director
of Labor, Veterans Employment
& Training Services
Rachel Livengood,
Second Chair
Elliot Fishman, Advocate

For the Union
Richard Svoboda,
Steward and Grievant
Nancy A. Simons, Grievant
Harold Greenawalt, Grievant
Bruce Wyngaard,
Director of Arbitration Services
Gregory P. Smith, Steward
Steven W. Lieber,
Staff Representative
Lynn Dennison,
Arbitration Clerk
Tim Miller,
Staff Representative

INTRODUCTION

This is a proceeding under Article 25, Sections 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, the Bureau of Employment Services, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for the period July 1, 1989 through December 31, 1991. (Joint Exhibit 1).

The arbitration hearing was held on August 15, 1991 at the office of the Ohio Civil Service Employees Association, 1680 Watermark Drive, Columbus, Ohio. The Parties had selected David M. Pincus as the Arbitrator.

At the hearing the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both Parties indicated that they would submit briefs. Per the agreed to time limit, both Parties had their briefs duly postmarked October 7, 1991

STIPULATED ISSUES

Does the Collective Bargaining Agreement (Joint Exhibit 1) provide the Arbitrator with authority to review the Employer's justification for abolishing the contested positions?

Does the Employer have the burden of proof in establishing by the preponderance of the evidence that it was justified in abolishing the contested positions?

Did Management violate Article 18 and Civil Service Law when it abolished DVOS positions in Akron, Cincinnati, and Painesville? If so, what shall be the remedy?

Whether the grievance (Joint Exhibit 3) filed by Nancy Simons was filed timely in accordance with Article 25 of the Collective Bargaining Agreement? Was the grievance covered under the class action grievance (Joint Exhibit 2) filed by Richard Svoboda?

Did Management violate Article 18 and Civil Service Law when DVOS Thomas Payne, bumped Nancy Simons, Grievant, due to an alleged veteran preference? If so, what shall be the remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE 3 - UNION RIGHTS

. . .

Section 3.08 - Information Provided to the Union

The Employer will provide to the Union monthly a listing of all approved personnel actions involving bargaining unit employees.

The Employer agrees to furnish the appropriate union representatives a quarterly seniority list. The respective lists will include the employee's name, social security number, state seniority, classification seniority, classification series seniority, institutional seniority and agency seniority.

The Employer will provide the Union with a list of employees who have paid union dues and fair share fees. The list will accompany the transmittal of monies.

The Employer will furnish tables of organization as prepared from time to time by the agencies covered by this Agreement.

. . .

(Joint Exhibit 1, Pg. 5)

ARTICLE 5 - MANAGEMENT RIGHTS

Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the

Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in The Ohio Revised Code, Section 4117.08(C), Numbers 1-9.

(Joint Exhibits 1, Pg. 7)

ARTICLE 18 - LAYOFFS

Section 18.01 - Layoffs

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

Section 18.02 - Guidelines

Retention points shall not be considered or utilized in layoffs. Performance evaluations shall not be a factor in layoffs. Layoffs shall be on the basis of inverse order of state seniority.

Section 18.03 - Bumping in the Same Office, Institution or County

The affected employee may bump any less senior employee in an equal or lower position in the same, similar or related class series within the same office, institution or county (see Appendix I) provided that the affected employee is qualified to perform the duties.

Section 18.04 - Bumping in the Agency Geographic Jurisdiction

If the affected employee is unable to bump within the office, institution or county, then the affected employee shall have the option to bump a less senior employee in accordance with Section 18.03 within the appropriate geographic jurisdiction of their Agency (see Appendix J).

Section 18.05 - Limits

There shall be no bumping for Bargaining Unit 3 employees in the Department of Rehabilitation and Corrections. There shall be no inter-agency bumping. There shall be no inter-unit bumping except in those cases allowed by current administrative rule or where a class series overlaps more than one unit.

Section 18.06 - Geographic Divisions

The jurisdictional layoff areas shall not be utilized. Instead, the geographic divisions of each agency shall be used (see Appendix J).

Section 18.07 - Classification Groupings

For the purposes of this Article, Appendix I shall be changed as follows: In Unit 4, groupings 3 and 4 shall be combined.

Section 18.08 - Recall

When it is determined by the Agency to fill a vacancy or to recall employees in a classification where the layoff occurred, the following procedure shall be adhered to:

The laid-off employee with the most state seniority from the same, similar or related classification series shall be recalled first (see Appendix I). Employees shall be recalled to a position for which they meet the minimum qualifications as stated in the Classification Specification. An employee recalled under this Article shall not serve a new probationary period, except for any employee laid off who was serving an original or promotional probationary period which shall be completed. Employees shall have recall rights for a period of eighteen (18) months.

Notification of recall shall be by certified mail to the employee's last known address. Employees shall

maintain a current address on file with the Agency. Recall rights shall be within the Agency and within recall jurisdictions as outlined in Appendix J. If the employee fails to notify the Agency of his/her intent to report to work within seven (7) days of receipt of the notice of recall, he/she shall forfeit recall rights. Likewise, if the recalled employee does not actually return to work within thirty (30) days, recall rights shall be forfeited.

Section 18.09 - Re-employment

Re-employment rights in other agencies shall be pursuant to Administrative Rule 123:1-41-17. Such rights shall be for eighteen (18) months.

(Joint Exhibit 1, Pgs. 32-33)

ARTICLE 25 - GRIEVANCE PROCEDURE

Section 25.01 - Process

A. A grievance is defined as any difference, complaint or dispute between the Employer and the Union or any employee affecting terms and/or conditions of employment regarding the application, meaning or interpretation of this Agreement. The grievance procedure shall be the exclusive method of resolving grievances.

B. Grievances may be processed by the Union on behalf of a grievant or on behalf of a group of grievants or itself setting forth the name(s) or group(s) of the grievant(s). Either party may have the grievant (or one grievant representing group grievants) present at any step of the grievance procedure and the grievant is entitled to union representation at every step of the grievance procedure. Probationary employees shall have access to this grievance procedure except those who are in their initial probationary period shall not be able to grieve disciplinary actions or removals.

C. The word "day" as used in this article means calendar day and days shall be counted by excluding the first and including the last day. When the last day falls on a Saturday, Sunday or holiday, the last day shall be the next day which is not a Saturday, Sunday or holiday.

D. The mailing of the grievance appeal form shall constitute a timely appeal if it is postmarked within the appeal period. Likewise, the mailing of the answer shall constitute a timely response if it is postmarked within the answer period. The Employer will make a good faith effort to insure confidentiality.

. . .

Section 25.02 - Grievance Steps

Step 1 - Immediate Supervisor

The grievant and/or the Union shall orally raise the grievance with the grievant's supervisor who is outside of the bargaining unit. The supervisor shall be informed that this discussion constitutes the first step of the grievance procedure. All grievances must be presented not later than ten (10) working days from the date the grievant became or reasonably should have become aware of the occurrence giving rise to the grievance not to exceed a total of thirty (30) days after the event. If being on approved paid leave prevents a grievant from having knowledge of an occurrence, then the time lines shall be extended by the number of days the employee was on such leave except that in no case will the extension exceed sixty (60) days after the event. The immediate supervisor shall render an oral response to the grievance within three (3) working days after the grievance is presented. If the oral grievance is not resolved at Step One, the immediate supervisor shall prepare and sign a written statement acknowledging discussion of the grievance, and provide a copy to the Union and the grievant.

. . .

(Joint Exhibit 1, Pgs. 40-41)

Section 25.03 - Arbitration Procedures.

Both parties agree to attempt to arrive at a joint stipulation of the facts and issues to be submitted to the Arbitrator.

. . .

Questions of arbitrability shall be decided by the Arbitrator. Once a determination is made that a matter is arbitrable, or if such preliminary determination cannot be reasonably made, the Arbitrator shall then proceed to determine the merits of the dispute.

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 no specifically required by the expressed language of this Agreement.

. . .

(Joint Exhibit 1, Pgs. 43-44)

. . .

Section 25.08 - Relevant Witnesses and Information

The Union may request specific documents, books, papers or witnesses reasonably available from the Employer and relevant to the grievance under consideration. Such request shall not be unreasonably denied.

(Joint Exhibit 1, Pg. 46)

ARTICLE 42 - SAVINGS

Should any part of this Agreement be declared invalid by operation of law or by a tribunal of competent jurisdiction, the remainder of the Agreement will not be affected thereby but will remain in full force and effect. In the event any provisions is thus rendered invalid, upon written request of either party, the Employer and Union will meet promptly and negotiate a mutually satisfactory modification within thirty (30) days.

(Joint Exhibit 1, Pg. 70)

ARTICLE 43 - DURATION

Section 43.01 - Agreement

To the extent that this Agreement addresses matters covered by conflicting State statutes, administrative rules, regulations or directives in effect at the time of the signing of this Agreement, except for Ohio Revised Code Chapter 4117, this Agreement shall take precedence and supersede all conflicting State laws.

Section 43.02 - Preservation of Benefits

To the extent that State statutes, regulations or rules promulgated pursuant to Ohio Revised Code Chapter 119 or Appointing Authority directives provide benefits to state employees in areas where this Agreement is silent, such benefits shall continue and be determined by those statutes, regulations, rules or directives.

. . .

(Joint Exhibit 1, Pgs. 70-71)

CASE HISTORY

In May of 1988, the Congress of the United States enacted Title 38, United States Code Chapters 41, 42 and 43. This legislation was promulgated with the specific intent and purpose of effectuating the following primary statutory goals: Job and job training counseling service programs; employment placement service programs; and job training placement service programs for eligible veterans and eligible persons. It, moreover, designated the Assistant Secretary of Labor for Veterans' Employment and Training as the individual responsible for the promulgation and administration of policies and regulations relevant to the accomplishment of the previously specified goals (Joint Exhibit 5).

Chapter 41, Section 2003A(a)(1) establishes Disabled Veterans' Outreach Programs and funds Disabled

Veterans' Outreach Program Specialists (DVOPS) through federal grants to individual states. Each eligible state can obtain necessary funds to support the appointment of one Disabled Veteran Outreach Program Specialist for each 5,300 veterans of the Vietnam era and disabled veterans residing in each state. This same section, moreover, provides for a preference in the appointment of specialists. The preference hierarchy consists of the following order: Qualified disabled veterans of the Vietnam era; other qualified disabled veterans; and any qualified veteran (Joint Exhibit 5).

Section 2003A(c) specifies the functions to be performed by DVOPS. These include, in pertinent part, the following duties: Development of job and job training opportunities; promotion and development of apprenticeship and other on-the-job training positions; the carrying out of outreach programs and activities; consultation and coordination with representatives of Federal, State and local-programs to develop networks for the purpose of developing linkages to promote employment opportunities; vocational guidance or vocational counseling services; and provision of services as a case manager (Joint Exhibit 5).

In addition to the previously mentioned programs, Chapter 41, Section 2004(a)(1) establishes Local Veterans Employment Representative (LVER) positions. Again, these are federally funded positions housed in states' employment services offices. Section 2004(2)(A) describes an allocation formula based upon the number of eligible veterans and eligible persons registered for assistance. Carl K. Price, Assistant Director of Labor, Veterans' Employment and Training Services, stated that LVERS serve as supervisors of programs on a state-wide basis. A significant portion of their work consists of local office evaluations for compliance purposes.

Dan Bloodsworth, a Veterans' Employment Administrator, and Price reviewed the annual grant letting process. On an annual basis, the Department of Labor applies the formula contained in Title 38 to determine the total number of state-wide DVOP positions to be funded. Once this figure is determined, the Department of Labor solicits DVOP and LVER grant applications (Joint Exhibit 6) from each state for the upcoming Federal Fiscal Year, which spans from October to September of the following year. The solicitation stage initiates the negotiation process between the Employer and the Department of Labor's representatives regarding the allocation of DVOP positions in employment service offices and outstations.

Bloodsworth and Price testified the Department of Labor and the Employer engaged in a similar negotiation process for the 1990 Federal Fiscal Year (October 1, 1989-September 30, 1990). Negotiations involved the allocation of eighty-three DVOP positions. Price testified three personnel moves were purportedly mutually agreed to by the Department of Labor. One DVOP position was to be eliminated from the Painesville, Cincinnati and Akron employment service offices.

When the Department of Labor and the Employer began to negotiate the terms of the 1991 Federal Fiscal Year grant (October 1, 1991-September 30, 1991), the total number of DVOP positions had been reduced by one to eighty-two positions. Price, however, was presented with information which caused some consternation on his part. It was determined that none of the moves decided upon for Federal Fiscal Year 1990 had been implemented. These individuals, more specifically, were in positions for which they were not authorized. Price indicated his office was strongly considering the possibility of recovering funds or defunding these positions because they were improperly manned.

Bloodsworth expressed the dilemma faced by the Employer which caused the tardy response to the 1990 negotiated outcome. The Employer had to comply with the grant's conditions. And yet, it was awaiting several arbitration decisions to determine the propriety of any abolishment or transfer decision.

Within this context, the Department of Labor and the Employer negotiated a number of abolishments and additions to the field staff. Four DVOP positions were scheduled for elimination at the specified locations: Akron (2), Painesville (1); and Cincinnati (1). Some of these positions, however, were not totally lost because new or added positions were negotiated: Two DVOP positions in Canton and one in Xenia. These various adjustments led to a net reduction of one DVOP position over the prior fiscal year's staffing allocation.

On August 28, 1990, Ellen O'Brien Saunders, the Administrator of the Ohio Bureau of Employment Services, notified the Ohio Department of Administrative Services about a forthcoming series of abolishments to be effectuated on September 29, 1990. The following particulars were contained in the abolishment notice:

". . .
I am writing to advise you of a Federally required layoff, involving four positions within OBES, that must occur before the beginning of the Second Quarter, State Fiscal Year 1991. This layoff is in accordance with Sections 124.321 through 124.327 of the Ohio Revised Code, and Sections 123:1-41-01 through 123:1-41-32 of the Ohio Administrative Code.

Each year, the Bureau negotiates with the Department of Labor Veterans Employment and Training Services for a grant supporting the use of disabled veterans to offer employment counseling services to other veterans. The size of the annual grant is contingent on the number of veterans within the State of Ohio.

For the upcoming Federal Fiscal Year, beginning October 1, 1990, it has been determined by the Department of Labor that four Disabled Veterans Outreach Specialist positions will be eliminated from the grant agreement for reasons of efficiency and economy: one position in Cincinnati, one in Painesville and two in Akron. These four positions were targeted, based upon the number of disabled veterans in their respective geographic areas. The funds must be reallocated to other geographic areas to reflect the proportion of disabled veterans in those areas. This will result in the layoff of four staff members in these offices, based upon seniority under the contract between the State of Ohio and the Ohio Civil Service Employee's Association.

It is mandatory that the layoffs and elimination of the positions occur prior to October 1, 1990, due to the discontinuance of funding for the positions at that time. Specific information on the positions is supplied in the enclosure.
. . ."

(Joint Exhibit 10)

The Employer did in fact implement its abolishment strategy which precipitated a class action grievance and a number of individual grievances. Richard Svoboda, a DVOP Specialist and Steward, testified he participated in a meeting in Akron, Ohio during September of 1990. This meeting discussed the anticipated abolishments. As a consequence, on September 25, 1990, filed a class action grievance. It contained the following relevant particulars:

". . .
State of facts (who, what, where, when?)

On or about 9/18/90 there were letters received by several DVOS's across the State informing them that due to a funding reduction from the DOL they were being laid off effective 9/30/90. The employees seniority dates were not a factor in the selection, which seems to have been done at random. The Union was not notified of any impending lay-offs or of any shortage of funding which might lead to a lay-off. The notices that were sent to the employees were very nondescriptive as to the reasoning behind this action and was also vague as to their options as a result of being laid off. There are other employees in this classification that have less seniority than those who were laid off.

Remedy sought:

The immediate revocation of this action and all affected employees returned to their former positions and to be made whole in every way, and any other remedy deemed
appropriate.
. . ."

(Joint Exhibit 2)

The class action grievance was taken to Step 3 by the Union. It was, however, denied on November 9,

1990 by Noah Taylor, the Labor Relations Hearing Officer (Joint Exhibit 2).

The Office of Collective Bargaining's Step 4 Grievance Review resulted in a similar negative outcome. On January 7, 1991, Dick Daubenmire, Contract Compliance Chief, concluded no contractual violation had occurred and denied the grievance. He relied on the following particulars as justification for the decision:

". . .
The Disabled Veteran's Outreach Specialist positions in question (DVOS) are 100% federally funded by the Department of Labor. Federal regulations govern the DVOS positions. Accordingly, the Department of Labor, who is not a party to the current collective bargaining agreement, would not be required to follow the layoff provision set forth in Article 18 of the contract. Further, according to the federal preemption doctrine, any federal regulations regarding these positions would preempt or supersede the provisions of Article 18 of the contract.
. . ."

(Joint Exhibit 2)

Two individual grievances were also filed by bargaining unit members. Carl Luebking was employed as a Disabled Veteran Outreach Specialist (DVOP) in the Painesville, Ohio local office. He was notified on September 14, 1990 that for reasons of efficiency and economy his position was being eliminated effective September 29, 1990. On September 26, 1990, Luebking filed a grievance contesting the abolishment. It contained the following Statement of Facts:

". . .
The State of Ohio discriminated against Mr. Luebking a disabled Vietnam veteran by singling him out of all the DVOP program for layoff on September 14, 1990 when they issued a layoff letter. He has over seven years seniority.
. . ."

(Joint Exhibit 4)

On November 2, 1990, a Third Level grievance meeting was held in the Painesville, Ohio local office. The Labor Relations Hearing Officer denied the grievance basing it on the mandates contained in the federal legislation governing the funds used to support the DVOS program (Joint Exhibit 4).

Daubenmire denied the grievance at Step Four. For the most part, he relied on a federal preemption theory to reach the above-mentioned outcome. Daubenmire emphasized that federal regulations supersede the provisions contained in Article 18 (Joint Exhibit 4).

The other individual grievance was filed by Nancy A. Simons who was employed as an Employment Services Interviewer in the Cincinnati, Ohio local office. She was notified on September 28, 1990 that she had been displaced from her position effective on October 12, 1990. Her displacement took place as a consequence of an abolishment and subsequent bump in accordance with Section 18.03. On September 13, 1990, Simons filed a grievance contesting her displacement. It contained the following Statement of Facts:

". . .
OCSEA, Local 11, AFSCME, AFL-CIO and/or Nancy A. Simons makes such a claim that management has failed to provide accurate quarterly seniority lists. OCSEA, Local 11, AFSCME, AFL-CIO, and/or Nancy A. Simons makes such claim that management has denied due process of law with the displacement of grievant from her position of Employment Services Representative. Grievant was not informed of appeal rights nor was she least senior in the class series.
. . ."

(Joint Exhibit 3)

It should be noted the grievance was not settled at Steps Three and Four of the grievance procedure.

The specified justifications closely approximated those enunciated with respect to Luebking's claim (Joint Exhibit 4).

PRELIMINARY COMMENTS

The number of issues in dispute and their interrelatedness require some preliminary discussion to establish the organization of the remaining portions of this Opinion and Award.

At the hearing and in footnote 1 of the Employer's Brief the Employer reserved its right to various positions it originally argues in a recent abolishment case decided by this Arbitrator.[1] Its position that under the Collective Bargaining Agreement (Joint Exhibit 1), the abolishment rationale is not an arbitrable matter is presently before the County Court of Common Pleas (Case No. 91-CVH08-6190). This Arbitrator's view on this and related matters will be articulated without a prior summary of the Parties' opposing arguments dealing with non-preemption abolishment situations. This organizational scheme was agreed to by the Parties in a telephone conference initiated by the Arbitrator on November 4, 1991. Some of the issues dealt with in the Broadview case are identical to those reserved by the Parties in the present instance. As such, these issues will be dealt with by articulating, in summary form, the findings contained in the Opinion and Award specified in the Broadview case. This analysis will then be applied to the present dispute under those circumstances whose veterans preference does not play a role, and thus, no apparent conflict exists between the Collective Bargaining Agreement (Joint Exhibit 1) and federal statutory requirements.

A related substantive arbitrability issue will follow. This issue deals with federal law preemption, and whether the federal law dealing with veterans preference precludes this Arbitrator from reviewing the rationale for the job abolishments.

The resolution of the prior issue will determine how the various abolishments will be analyzed. Some may be precluded from any analysis, while others may include a traditional analysis with emphasis placed on the requirement specified in Article 17. Other grievances may also be analyzed from a procedural arbitrability standpoint depending on the substantive arbitrability analysis.

THE ARBITRATOR'S OPINION AND AWARD DEALING WITH THE SUBSTANTIVE ARBITRABILITY CLAIM WHEN FEDERAL STATUTE PREEMPTION IS NOT INVOLVED

This Arbitrator finds he has the authority to review whether the Employer has complied with procedural and substantive abolishment requirements.

Even though Article 5 and its addendum, Ohio Revised Code Section 4117.08(C), Numbers 1-9 allow the Employer to determine organizational structure and layoffs, these rights are not totally unfettered and are subject to review. Article 5 contains a proviso which underscores the Parties acknowledgment of this requirement. It states in pertinent part:

". . .
Such rights shall be exercised in a manner which is not inconsistent with this Agreement.
. . ."

The Employer's substantive arbitrability claim would conflict with other relevant portions of the Agreement (Joint Exhibit 1) because the Parties have empowered this Arbitrator, their agent, to make a "contract of settlement" of their dispute.

Article 25 contains provisions dealing with the grievance procedure which serve to define the scope of an arbitrator's authority. The Parties, in Section 25.01, have defined a grievance in extremely broad terms. The definition encompasses any (Arbitrator's emphasis) difference, complaint or dispute affecting terms and/or conditions of employment regarding the application, meaning or interpretation of the Agreement (Joint Exhibit 1). Obviously, the procedural and/or substantive underpinnings of an abolishment decision

dramatically impact employees' terms and conditions of employment. Also, the application and meaning of Article 18 requirements fall well-within this proviso. Nothing in Section 25.01 precludes the filing of a grievance contesting the propriety of an abolishment decision. As a consequence, this section not only provides these types of grievances with proper standing, it also serves as an empowerment vehicle because it fails to clearly articulate any limitation on an arbitrator's authority.

Section 25.03, Arbitration Procedures, contains language which supports the Union's arbitrability argument. A ruling in the Employer's favor would result in a direct violation of the express terms negotiated by the Parties. This provision prohibits an Arbitrator's imposition "...on either party a limitation or an obligation not specifically required by the expressed language of the Agreement." Nothing in the Collective Bargaining Agreement (Joint Exhibit 1) expressly prohibits an arbitrator from engaging in a review of procedural and substantive abolishment layoff decisions. Article 18, Section 25.03, Article 5, and section 25.01 do not contain a prohibition dealing with an Arbitrator's authority in this area. Such a limitation needs to be clearly and unequivocally articulated; a reserved rights reference does not serve as an adequate bar. Section 24.01 may prevent an arbitrator from modifying a termination decision. The Agreement (Joint Exhibit 1) would have to contain similar language to limit an Arbitrator's authority in the abolishment/layoff area.

The Employer's argument is further rebutted by language contained in Section 43.02 which deals with the preservation of employee benefits. This provision provides for the continuance of benefits conferred upon employees by statutes, regulations or rules where the Agreement (Joint Exhibit 1) is silent. The Parties never specifically limited the "benefits" in question to pecuniary or economic gains. Such intent should have been supported by bargaining history or specific limitations contained in this section of the Agreement (Joint Exhibit 1). In fact, the provision references Ohio Revised Code Chapter 119 which discusses, in pertinent part, administrative procedures, and does not deal with "economic" considerations.

It is abundantly clear that prior to the onset of statute-based collective bargaining in the State of Ohio, civil service employees were granted the-benefit of abolishment and layoff appeals. This appeals process now rests within the grievance and arbitration sections negotiated by the Parties. The grievance, therefore, is properly before the Arbitrator.

THE ARBITRATOR'S OPINION AND AWARD DEALING WITH THE BURDEN OF PROOF OF ANY ABOLISHMENT DECISION WHEN FEDERAL STATUTE PREEMPTION IS NOT INVOLVED

The Ohio Administrative Code Rule 124-7-01(A)(1) which states in pertinent part:

". . .
124-7-01 Job Abolishments and Layoffs. (A) Job abolishments and layoffs shall be disaffirmed if the action is taken in bad faith. The employee must prove the appointing authority's bad faith by a preponderance of the evidence. (1) Appointing authorities shall demonstrate by a preponderance of the evidence that a job abolishment was undertaken due to the lack of the continuing need for the position, a reorganization for the efficient operation of the appointing authority, for reasons of economy or for a lack of work expected to last more than twelve months.
. . ."

On the basis of recent court decisions and relevant contract language, the Employer is required to demonstrate by a preponderance of the evidence that the job abolishments were properly implemented.

In Clark, the court concluded that no conflict existed between a statutory provision and the provisions of a collective bargaining Agreement since:

“. . .
The Agreements at issue did not specifically address the matter of prior service credit for the purposes of computing vacation leave. R.C. 4117.10(A) clearly requires that the parties be subject to all laws pertaining

to wages, hours and terms and conditions of employment when no specification as to such a matter is made. . . ."[2]

The present fact situation is virtually analogous to the one discussed in Clark.

Here, Article 18, and specifically Section 18.01, do not specifically address whether an appointing authority must substantiate the abolishment decision by a preponderance of the evidence or any other standard of proof. The Parties more specifically, did not specifically address this matter. As such, Ohio Revised Code Section 4117.01(A) requires that the Parties be subject to the evidentiary standard enunciated in Ohio Administrative Code Rule 124-7-01(A)(1).

Once again, Section 43.02 provides additional credence to this interpretation. Ohio Administrative Code Rule 124-7-01(A)(1) was employed in appeals taken to the State Personnel Board of Review. Neither the record of the present proceeding nor any contractual term or provision negotiated by the Parties indicate that the above-mentioned burden requirement was somehow discontinued by the Parties. This requirement is, indeed, a benefit because it enhances the value of the property or rights of those covered by the Collective Bargaining Agreement, and particularly Article 18 provisos.[3] As such, the benefits contained in Ohio Administrative Code Rule 124-7-01(A)(1) shall continue and shall govern the propriety of any abolishment decision.

GUIDELINES TO BE EMPLOYED WHEN DETERMINING THE PROPRIETY OF ANY ABOLISHMENT DECISION WHEN FEDERAL STATUTE PREEMPTION IS NOT AT ISSUE

Section 18.01 incorporates Ohio Revised Code 124-321(D) which provides, in pertinent part:

". . .
(D) Employees may be laid off as a result of abolishment of positions. Abolishment means the permanent deletion of a position or positions from the organization or structure of an appointing authority due to lack of continued need for the position. An appointing authority may abolish positions as a result of a reorganization for the efficient operation of the appointing authority, for reasons of economy, or lack of work. The determination of the need to abolish positions shall indicate the lack of continued need for positions within an appointing authority. Appointing authorities shall themselves determine whether any position should be abolished and shall file a statement of rationale and supporting documentation with the Director of Administrative Services prior to sending the notice of abolishment. If an abolishment results in a reduction in the work force the appointing authority shall follow the procedures for laying off employees.
. . ."

The language contained in Ohio Revised Code 124.321(D) suggests a sequential analysis of any abolishment decision; the reasoning is articulated below.

A reading of the statute indicates that the language defining abolishment must be initially confronted because it serves as the threshold issue. The statute defines this critical condition as meaning "...the permanent deletion of a position or positions...due to lack of continued need for the position..." This definition, therefore, contemplates the permanent elimination of a position because the work performed or services provided are no longer required by the appointing authority.[4] It does not contemplate the laying off of a person "...while leaving that position intact for another person to fill. Whether that person is another public employee or an employee of a private concern."[5] A permanent deletion, more specifically, does not exist when substantially the same work previously performed by the ousted employee is presently performed, as a function of a meer transfer, by others in a similar capacity.[6] Nothing in the abolishment

statutes and regulations, however, prohibits an appointing authority from consolidating or redistributing some of the employee's duties to other employees.[7] As such, if the specific work in question needs to be performed, and it is not accomplished by consolidation or redistributing, the position cannot legitimately be abolished as a consequence of statutory definition. 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. In a similar fashion, 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.

If the record establishes that the appointing authority has complied with the statutory definition of an abolishment, certain circumstances may allow the abolition of positions. These circumstances are specified in Ohio Revised Code 124.321(D) and include: Reorganization for purposes of efficiency, reasons of economy, or lack of work. Therefore, if an appointing authority's reorganization can operate more efficiently or economically by either not performing a given service or by legitimately consolidating the services of the abolished position with another position in the organization, then the appointing authority may abolish the position. Obviously, if an abolishment is approved, these appropriate circumstances must be justified by a preponderance of the evidence as specified in Ohio Administrative Code 124-7-01(A)(1).

THE PARTIES' SUBSTANTIVE ARBITRABILITY ARGUMENTS DEALING WITH FEDERAL LAW PREEMPTION

The Position of the Employer

It is the position of the Employer that those abolishment decisions which followed federal requirements, but conflicted with provisions contained in Article 18, were not substantively arbitrable. The mandates in the enabling legislation contained in Title 38, Chapter 41, supersede any contractual obligations negotiated by the Parties.

Title 38 was promulgated to alleviate the unemployment and under employment of disabled and Vietnam-era veterans. To accomplish these desirous goals, the statute specifies a preference for disabled veterans and establishes an administrative arm which supervises the placement, allocation and funding of DVOP positions by states' employment service offices. Compliance with these various decisions is accomplished by its ability to defund positions and/or programs. Enforcement, moreover, is done by issuing program letters which interpret the statute and administer the program in accordance with Section 2007(a)(2).

A ruling in the Employer's favor would also reinforce the view taken by the federal courts. These courts have recognized the preemption of collective bargaining agreements by veterans' employment laws. An alternative ruling, one espousing the primacy of terms and conditions negotiated by parties, would offset rights secured by act of Congress. Such an outcome is obviously precluded by federal law.

The Position of the Union

The Union acknowledged a conflict exists between the seniority language contained in Section 18.03 and the veterans preference language enumerated in Title 38, Chapter 41 (Joint Exhibit 5) and related Veterans' Program Letters (Joint Exhibits 8 and 9). It was asserted that the terms negotiated by the Parties should prevail. The Collective Bargaining Agreement (Joint Exhibit 1) was viewed as the source of the Arbitrator's authority. Since Article 18 fails to reference veterans preference status, abolishments and related bumping procedures must be based on State of Ohio seniority status.

The Employer's preemption argument was thought to be defective because it relied on the Veterans' Program Letters (Joint Exhibits 8 and 9). Title 38 requirements focus on veteran preference in hiring situations; they fail to require similar application in job abolishments and bumping situations. As such, the program letters promulgated by the Assistant Secretary for Veterans' Employment and Training are his interpretation of what the statute requires, they do not constitute law. Contractual provisions, moreover, cannot be altered by an outside agency or an employee unless a union agrees to such a modification.

Mutually agreed to obligations cannot be shifted by a mechanism outside of the immediate relationship; to do so would violate public policy.

THE ARBITRATOR'S OPINION AND AWARD DEALING WITH FEDERAL LAW PREEMPTION

An obvious conflict exists between Article 18 provisions dealing with abolishment and bumping protocols and requirements contained in Title 38, U.S.C., Chapter 41. The specific areas of conflict deal with the statutory appointment preferences DVOP Specialists enjoy for retention, recall and appointment purposes. These preferences are given in the following priority: Service-connected disabled veterans of the Vietnam era, other service-connected disabled veterans, or any other veteran. (Joint Exhibit 5 and Joint Exhibit 8). Article 18, however, refers to layoffs and bumping on the basis of inverse order of State seniority. In my opinion, conflicts of this sort, when they do arise, must be resolved in favor of the federal statute. The reasoning for this conclusion follows.

Neither the Collective Bargaining Agreement (Joint Exhibit 1) nor the Ohio Revised Code Chapter 4117 empower the Parties to negotiate contract language which conflicts with federal statutes. Section 43.01 allows the Parties to enter into an agreement which supersedes conflicting state laws, except for Ohio Revised Code Chapter 4117. There is no mention of an agreement superseding federal statutes. Similarly, several recent State of Ohio court decisions[8] have interpreted Ohio Revised Code Section 4117.10(A) as requiring the Parties to a collective bargaining agreement to be subject to all laws pertaining to wages, hours and terms and conditions of employment when no specification as to such a matter is made. This portion of the Code, however, does not allow the Parties to enter into an agreement which conflicts with federal law.

There has been considerable debate over the degree, if any, to which an arbitrator should go outside the four corners of the labor agreement to examine statutory law. The arguments provided generally focus on two opposing views. One argument expresses the view that an arbitrator is merely authorized to interpret the terms and conditions negotiated by the parties. Another urges an examination of the applicable external law because an award must be compatible with the applicable law. As a Panel Arbitrator, I have often seen the Parties' arguments shift regarding this matter depending upon the desired outcome. In my opinion, it is unrealistic not to look outside the labor agreement when a potential conflict with the external law may play a pertinent role in any analysis. It is axiomatic that a contract provision contrary to law is unenforceable and does not bind the parties.[9] Oftentimes, courts have vacated arbitration awards when its enforcement would require violation of law.[10]

A frequently cited Ohio Supreme Court decision[11] reinforces the view that a collective bargaining agreement cannot impose certain obligations which conflict with the law. The court considered whether a board of education is vested with discretionary authority to negotiate and enter into a collective bargaining agreement with its employees. Such an Agreement was deemed to be proper as long as the terms and conditions do not conflict or abrogate the duties imposed on the board by law.

One can also infer that the Parties desire a legal award based upon the language contained in Article 42 the "savings" clause. By negotiating this language, the Parties intended to isolate any invalidity and insulate the remaining legal portions of their Agreement. The Parties recognized that a particular contract provision could be deemed unenforceable by operation of law or by a tribunal of competent jurisdiction. Obviously, the Parties do not wish to be bound by an invalid provision. As such, it seems clearly evident that an arbitrator should not enforce a provision which is clearly unenforceable under the law. An outcome of this sort was readily anticipated by the Parties as evidenced by Article 42; the present ruling should not be viewed as a total surprise.

This Arbitrator also orders deviation from the provisions contained in Article 18 because they are clearly in conflict with clear congressional edict. Title 38, United States Code, Chapter 41, Section 2002 specifies the primary goal of this legislation as "alleviating unemployment and underemployment among veterans," especially disabled Vietnam-era veterans.

To accomplish these goals, and in recognition of the special nature of employment and training needs,

the statute establishes certain administrative duties and oversight functions. Section 2002 provides for the promulgation and administration of policies and regulations by an Assistant Secretary of Labor for Veterans' Employment and Training. As such, the Veterans' Program Letters (Joint Exhibits 8 and 9) are not mere interpretative bulletins but are directly and unequivocally referenced as valid work product developed by an Assistant Secretary of Labor.

When Veterans' Program Letter No. 587 (Joint Exhibit 8) was promulgated in April of 1982, it was issued as a clarification and restatement of preference requirements contained in Title 38 U.S.C. As such, statutory requirements specified in Section 2003A were clarified in terms of appointment preference, retention and recall rights of those holding DVOP positions. These clarifications do not exceed the original guidelines contained in Title 38 U.S.C. which deals with the appointment of specialists. Rather, they reflect an understanding that appointment preference cannot be viewed in a vacuum; such preference status potentially impact the retention and recall rights of DVOP employees under a collective bargaining agreement. These clarifications, moreover, were promulgated in accordance with Title 38 U.S.C., Section 2002 requirements. They also comply with the legislative history which indicates that statutory appointment preferences for DVOP Specialist positions would be filled by a service-connected disabled veteran if available.

THE ARBITRATOR'S OPINION AND AWARD DEALING WITH THE SUBSTANTIVE ARBITRABILITY CLAIM AND CONFLICTS BETWEEN THE FEDERAL STATUTE AND THE CONTRACT

The Parties' stipulated issue asked the Arbitrator to determine whether the Employer's actions violated Article 18 abolishment provisos. This issue is intrinsically related to the substantive arbitrability claim raised by the Employer, and whether a conflict exists between the federal statute and the contract (Joint Exhibit 1). This section of the Opinion and Award deals with ramifications surrounding a conflict between the federal statute and the Collective Bargaining Agreement (Joint Exhibit 1). Another forthcoming section of this opinion and Award will analyze a situation where a conflict does not exist. A traditional contractual analysis must be undertaken to evaluate the propriety of the abolishments under these circumstances.

The previous analysis clearly indicates that the Employer did not violate Article 18; there was no contractual breach. Rather, the Employer merely attempted to comply with federal statutory guidelines which conflict with Article 18 when dealing with DVOP Specialists' appointments, retention and recall rights. Within this context, it would be improper for the Arbitrator to determine whether the Employer has complied with Title 38 U.S.C., Chapter 41 requirements. The Parties, themselves, have foreclosed such an analysis. Article 42 limits the Arbitrator's authority in this area, and any question regarding the application of Title 38 U.S.C., Chapter 41 is subject to negotiation upon written request by either Party.

The abolishment which falls squarely within the above interpretation is the one dealing with Thomas Payne in the Cincinnati local office. Although Payne had sufficient seniority to bump other DVOP specialists under Section 18.02 of the Agreement, he did not possess sufficient veterans preference status in accordance with Veterans' Program Letter 5-87 (Joint Exhibit 8). As I mentioned above, an evaluation of this matter is outside the scope of my authority because of my substantive arbitrability ruling. The undisputed facts, however, evidence a statute and contractual conflict.

Nancy Simons' grievance is similarly not arbitrable on substantive grounds. Once again, an obvious conflict exists between the statute in question and Article 18 requirements. Simons was an Employment Services Representative and was displaced by Payne. Simons, in turn, displaced Gwendolyn Brazile, an Employment Services Interviewer. At the time of her displacement there were DVOP Specialists employed in the Cincinnati office with less state seniority. She, however, held no veterans preference status which placed her claim in jeopardy as a consequence of requirements contained in Veterans' Program Letter No. 5-87 (Joint Exhibit 8).

As a consequence of the above substantive arbitrability ruling, there is no need to review the procedural

arbitrability claims raised by the Employer. In a like fashion, the various procedural defect claims raised by the Union are similarly unpersuasive in light of the substantive arbitrability ruling.

ABOLISHMENT CLAIMS WHERE THE FEDERAL STATUTE AND THE CONTRACT DO NOT CONFLICT

Unlike the previously mentioned abolishment decisions, those discussed below do not reflect conflicts between federal statutory requirements and Article 18 particulars. As such, the principles discussed above regarding Ohio Revised Code section 124.321(D) will be considered. Where appropriate, the threshold definitional issue will be addressed; followed by an analysis of the circumstances identified as justifications for the abolishments and the Employer's ability to support the abolishments by a preponderance of the evidence. Each abolishment claim will be addressed in a separate opinion.

It should be noted that the Employer referenced reasons of efficiency and economy as justifications for the abolishments. These circumstances were referenced in a letter sent to the Ohio Department of Administrative Services by Saunders on August 28, 1990 (Joint Exhibit 10).

HAROLD GREENAWALT AND PATRICK MOORE

Background Facts

Both Greenawalt and Moore were serving as DVOP Specialists in the Akron, Ohio office when their positions were abolished. They "bumped" into two DVOP Specialist vacancies in the Canton, Ohio office by exercising their rights in accordance with Sections 18.03 and 18.04.

The Position of the Employer

Dan Bloodsworth, the Employer's Veterans' Employment Administrator, provided justification for the abolishments in the Akron, Ohio office. Two major justifications were emphasized by Bloodsworth. He noted the manpower mix was disproportionate in the Canton and Akron offices. The Akron office appeared to be overly manned in the DVOP Specialist and LVER positions. This discrepancy appeared a bit skewed in light of the number of disabled veterans registered at each location.

The Position of the Union

The Union alleged that these abolishments were in violation of Article 18 and related Ohio Revised Code provisions.

The data (Employer Exhibit 1) used to support the abolishments were thought to be tainted. The Union introduced data (Union Exhibits 2 and 3) gathered at the time of the abolishments which indicated Akron had more veterans registered than Canton.

The efficiency and economy claims were questioned because of the timing of the various personnel moves. Price and Bloodsworth acknowledged that the original Akron abolishments were actually scheduled for the 1989-1990 fiscal year. And yet, Greenawalt and Moore were stationed in Canton, while they actually worked in the Akron office. If the needs analysis conducted by the Employer was, indeed, accurate, the two individuals should not have remained in Akron for almost one year. Also, if the Employer wanted to equalize positions between Akron and Canton, Greenawalt had no business starting in Akron rather than Canton.

THE ARBITRATOR'S OPINION

The evidence and testimony clearly suggest that the two positions in question were properly abolished by the Employer. Section 124.321(D) requirements were established by a preponderance of the evidence.

Bloodsworth and Price provided credible and consistent testimony regarding the reasons underlying the

abolishment of two DVOP positions in Akron and adding two DVOP positions in Canton. File count data (Employer Exhibit 1) adequately support the notion that there was a need to equalize personnel. Both offices had similar case loads but did not have similar staffing arrangements. The Union's reliance on more recent data (Union Exhibits 2 and 3) did not modify this conclusion. A difference of one hundred registered veterans does not support the Union's premise; it does not represent a statistically significant difference in registered veterans.

The statute defines an abolishment as a permanent deletion of a position due to a lack of continuing need for the position. Here, the Employer established by a preponderance of the evidence that the adjustment in staffing levels was required. The number of registered veterans no longer supported the existing staffing levels in Akron, but justified added positions in Canton.

I am also convinced that the Employer's tardy implementation of the various personnel moves in no way discredits the underlying rationale. The confusion surrounding the application of the Agreement (Joint Exhibit 1), the federal statute (Joint Exhibit 5) and pending arbitration outcomes was adequately supported.

CARL LUEBKING

Background Facts

Carl Luebking was employed as a DVOP Specialist in the Painesville local office at the time of the abolishment. Debra Connelly, a Labor Relations Representative reviewed the various personnel moves surrounding the abolishment of Luebking's position.

When the abolishment decision was implemented Luebking was the least senior DVOP Specialist at the Painesville office. Also, Joseph Hutchinson, an LVER, was disabled but the Employer had not received his disability retirement notice (Employer Exhibit 3). Connelly maintained she initially offered Luebking a chance to bump into the Canton vacancies because of his seniority status. He refused this option which was then offered to Moore and Greenawalt. Since no vacancy existed within a job classification where Luebking would have received comparable pay to that of a DVOP Specialist, Luebking displaced Marion Bates, an Employment Services Interviewer, who was laid off as a consequence of Luebking's decision (Employer Exhibit 3). In October of 1990, Hutchinson eventually notified the Employer he was taking disability retirement. Pursuant to Article 18 requirements Luebking was recalled and filled Hutchinson's vacant position and Bates was also recalled to her prior position (Joint Exhibits 16 and 17).

The Employer's Position

The Employer alleged that the position was properly abolished based on efficiency and economy justifications. Bloodsworth maintained the statewide reduction in one DVOP Specialist slot mandated by the Department of Labor required the net abolishment of one position. The DVOP Specialist position in Painesville was selected because it provided the least disruptive alternative. Productivity data supported this decision. For approximately twenty months prior to the negotiations which led to the abolishment decision, Hutchinson had been on disability leave. As such, the office was being serviced by two DVOP Specialists because the LVER position held by Hutchinson had not been filled.

Bloodsworth and Price rejected the Union's analysis of the Painesville office's Program Services to Veterans' Report (Union Exhibit 1). Bloodsworth emphasized the report (Union Exhibit 1) was compiled after a grant agreement had been reached and negotiated by the State of Ohio and the Department of Labor. Price, moreover, maintained that statewide requirements must also be factored into a decision. He did, however, admit the recommendation contained in the evaluation to maintain two DVOP Specialist slots was not accepted once an explanation was given by the Employer.

The Position of the Union

The Union argued that the Painesville abolishment was defective because the Employer failed to support

its economy and efficiency claims.

The primary vehicle used to challenge the Employer's claim was a report (Union Exhibit 1) authored on August 6, 1990 by Ronald A. DeLisio, Regional Manager, Region III. This report served as an evaluation of ES Services to veterans at the Painesville, Ohio local office. The contents and related observations indicated that the Employer justified its abolishment decision on faulty or incorrect information. This office did not appear to be running efficiently with the existing manning level because the report cites numerous areas needing improvement. In fact, one obvious conclusion reached by the evaluator was that the office, at the time of the evaluation, was understaffed. The evaluator, moreover, indicated that the office may be losing credit for services they provide.

Several arguments were also provided dealing with the number of registered disabled veterans. First, the report (Employer Exhibit 1) used to predict projected registered veterans indicated an increase in the number of registered veterans. Second, the Cleveland South office had a greater number of DVOP Specialists, and yet, the report (Employer Exhibit 1) indicated fewer registered veterans. Third, the evaluator also suggested that a DVOP Specialist should be outstationed to Geauga County. This indicated a heightened need for an additional DVOP Specialist.

By having a DVOP Specialist serve in Hutchinson's LVER capacity while he was on disability leave, the Employer violated Article 19 of the Agreement (Joint Exhibit 1). An employee in a lower job classification was, therefore, performing work earmarked for an individual in a higher classification; work that would have been performed but for a disability leave situation.

THE ARBITRATOR'S OPINION

From the evidence and testimony introduced at the hearing, and a complete analysis of all pertinent contract provisions, it is this Arbitrator's opinion that Carl Luebking's position was improperly abolished. Section 124.321(D) requirements were not established by a preponderance of the evidence because the Employer failed to support its economy and efficiency claims.

This Arbitrator strongly disagrees with the Employer's arguments dealing with the DeLisio Report (Union Exhibit 1). It raises significant questions regarding the Employer's abolishment justifications. Bloodsworth attempted to discount the report (Union Exhibit 1) because it became available to the Employer and the Department of Labor after the abolishment decision had been mutually negotiated. The timing is of little consequence because the court in Bispeck[12] indicated that post abolishment data could be considered when determining whether efficiency gains were accomplished. Obviously, if post abolishment data can be evaluated by an arbitrator, data collected prior to the abolishment decision during June 6, 1990 through June 8, 1990 can provide valuable insight in terms of justification propriety.

The report (Union Exhibit 1) discusses several circumstances in existence prior to the abolishment which lead me to believe the abolishment decreased the probability of improved efficiency and economy. The office seemed to be deficient in terms of file search procedures. A review of the files indicated that veteran applicants were not afforded veterans preference during file search, selection and referral procedures (Union Exhibit 1, Pg. 26). Another deficiency surfaced regarding placement data. The ADVET concluded that the Painesville office may be losing credit for numerous placements because of the extremely long time that elapses between last referrals and when they are reconciled. On occasion six months elapsed between open job orders and the reconciliation process (Union Exhibit 1, Pg. 3). A glaring overall deficiency was also discussed in terms of the accepted method of operation in the office. The reviewer noted "quality has become an acceptable method of operation, while quality has diminished." These circumstances hardly support an improved efficiency abolishment justification.

Several other efficiency concerns were raised dealing with staffing problems. The ADVET noted that staffing could become a problem because the Painesville local office is actually two offices combined "under one roof" and the office services two counties (Union Exhibit 1, Pg. 27). Another recommendation offered by the reviewer indicated an increased role for the existing DVOS staff. He recommended that the staff be outstationed to Geauga County on a regular schedule by "equally sharing and rotating this activity (Union

Exhibit 1, Pg. 28)." It seems highly unlikely that this type of coverage could be accomplished after the abolishment of one DVOP Specialist position. A smaller number of individuals would be required to job share in this regularly scheduled activity.

The provided justifications are also deficient on a more general basis. Neither Price nor Bloodsworth were able to provide sufficient reasons for the selection of the Painesville office in their attempt to reduce the statewide DVOP Specialist allotment by one "net" position. When confronted by questions dealing with the projections contained in the A22 Report (Employer Exhibit 1) and relative comparisons in terms of veterans' registrations, their responses lacked sufficient clarity and conviction. Although Price spoke about a statewide analysis which led to the abolishment decision, the analysis was never introduced at the hearing.

AWARD

The following abolishments were not reviewed by this Arbitrator because they were outside the scope of this Arbitrator's authority, and thus, lacked substantive arbitrability. As such, the following associated grievances are denied: Thomas Payne and Nancy Simons.

A number of abolishments concerned situations where the federal statute and the contract did not conflict. Grievances dealing with these matters were filed by Harold Greenawalt and Patrick Moore. Since their positions were properly abolished in accordance with Section 124.321(D) requirements, their grievances are denied. The abolishment of Carl Luebking was found to be improper because it violated conditions contained in Ohio Revised Code Section 124.321(D). As such, the associated grievance is upheld because the Employer failed to support by a preponderance of the evidence that the abolishment was supported by economy and efficiency considerations.

This Arbitrator directs the Employer to pay Mr. Luebking the difference between Pay Range 28-DVOP and Pay Range 27-Employment Service Interviewer, including PERS contributions for the period October 1, 1990 to November 5, 1990. It was during this time frame that Luebking was improperly stationed as a consequence of the Employer's abolishment decision.

David M. Pincus
Arbitrator

November 14, 1991

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[1] The State of Ohio, Ohio Department of Mental Retardation and Developmental Disabilities, Broadview Developmental Center and Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, Paul Caldwell, Case No. 24-03-(88-10-25)-00-79-01-04 (Pincus, 1991).

[2] Rollins v. Cleveland Heights-University Heights Board of Education (1980), 40 Ohio St. 3d 123.

[3] Hooper v. Merchants' Bank and Trust Co., 130 S.E. 49.

[4] In re Appeal of Moreo (1983), 13 Ohio Ap. 3d 22; Griffith et al., v. Department of Youth Services (1985), 28 Ohio App. 3d 76.

[5] Carter, et al., vs. Ohio Department of Health (1986), No. 85 AP-752 (10th Dist. Ct. App. 1-9-86), 122.

[6] In re Appeal of Woods (1982), 7 Ohio App 3d 226.

[7] Keyerleber v. Cuyahoga County Mental Health Board, State Personnel Board of Review; 84-LAY-01-0048 (1985).

[8] State, Ex Rel. Clark, vs. Greater Cleveland Regional Transit Auth. (1990), 48 Ohio St. 3d 19. Rollins v. Cleveland Hts.-University Hts. Bd. of Edn. (1988), 40 Ohio St. 3d 123.

[9] Paper Workers v. Misco, Inc., 484 U.S. 29, 126 LRRM 3113 (1987); W.R. Grace & Co. v. Rubber Workers Local 759, 461 U.S. 757, 113 LRRM 2641 (1983).

[10] Postal Workers v. Postal Serv., G82 F. 2d 1280, 110 LRRM 2764 (9th Cir., 1982), Automobile Workers

Local 985 vs. W.M. Chace Co. 262 F. Supp. 114 64 LRRM 2098 (E.D. Mich. 1966).

[11] Dayton Teachers Assn. vs. Dayton Bd. of Edn. (1975), 41 Ohio St. 2d 127.

[12] Bispeck vs. Bd. of Commrs. of Trumbull County (1988), 37 Ohio St. 3d 26, 30.