ARBITRATION DECISION NO.:
554

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

EMPLOYER:
Department of Mental Health
Offices of Support Services
Dayton Mental Health Center

DATE OF ARBITRATION:

DATE OF DECISION:
August 9, 1994

GRIEVANT:
Stephen Thompson
Lawrence Foster
James Trimbach
Dennis Burton
Rick Cohen
David Chatman

OCB GRIEVANCE NO.:
23-08-(92-08-28)-0835-01-06
23-08-(92-08-28)-0836-01-06
23-08-(92-08-28)-0837-01-06
23-08-(92-08-28)-0838-01-06
23-08-(92-08-28)-0839-01-06
23-08-(92-08-28)-0840-01-06

ARBITRATOR:
Lawrence Loeb

FOR THE UNION:
Penny Lewis
Patrick D. Mayer

FOR THE EMPLOYER:
Timothy Wagner

KEY WORDS:
Removal
Job Abolishment
Displacement
Subsequently Bumped Employees
Arbitrability
Jurisdiction

ARTICLES:

Article 18 - Layoffs
- § 18.01 - Layoffs
- § 18.02 - Guidelines
- § 18.11 - Recall

Article 25 - Grievance Procedure
- § 25.01 - Process
- § 25.02 - Grievance Steps

FACTS:

The Chief of the Office of Support Services abolished the positions of Air Quality Technician 1 and Electrician 1 from the Centralized Food Processing Facility (CPF). The employer cited the following reasons as the rationale for the abolishment pursuant to Article 123:1-41-04: 1) reasons of economy, 2) reorganization for efficiency, and 3) permanent lack of work. The employees working in the positions of Air Quality Technician and Electrician were notified of these abolishments by their employer and they were allowed to bump into other positions at the Dayton Mental Health Center, pursuant to the contract. These employees initially challenged their abolishment and the employer's rationale for abolishing their jobs, but later withdrew their grievances.

As a result of the two initial job abolishments, six less senior employees were displaced. The six individuals who were affected by the realignment filed grievances claiming that the abolishments were unjust and caused them to unduly lose their positions. The grievants sought relief in the form of being reinstated to their former positions.

EMPLOYER'S POSITION:

The state believed that the arbitrator did not have jurisdiction to decide if management violated the contract because the two employees whose jobs were originally abolished withdrew their grievances. Management relied on a decision made by the State Personnel Board of Review in a similar case. In that decision, the administrative law judge held that only employees first affected by job abolishments, that is employees whose jobs have been abolished, have a right to challenge the rationale for the abolishment. The union, in the past, has stated that pertinent decisions by SPBR were binding, and as such, these decisions should be followed by the arbitrator. In the situation at hand, the state believed that if decisions by the SPBR should be considered in other arbitrations, then they should be considered in this one.

The state also believed that there were legitimate reasons for the employer's decision to contract out work which had previously been performed by the two employees. The duties of these employees were inadequately performed and they had done almost no preventative maintenance. The employer reaped significant financial savings as a result of the two abolishments, and the employer met its obligation under the contract. Therefore, the abolishment should not be set aside unless the union can establish by a preponderance of the evidence that the employer acted in bad faith. As there is no evidence of that whatsoever, then it follows that the grievances should be denied.

UNION'S POSITION:

The state initially raised an issue of arbitrability and alleged that the arbitrator did not have jurisdiction over the grievance because of a prior State Personnel Board of Review (SPBR) decision. The SPBR decision does not apply here because the decision involved exempt employees who are not covered by the Collective Bargaining Agreement. If an employee decides not to go forward with his or her grievance, the union still has the right under the contract to go forward to arbitration if it believes that the issues are important enough to warrant proceeding to arbitration. Furthermore, because the agreement is between the union and the employer, the ultimate responsibility for insuring that management adheres to the terms of the contract falls to the union. Therefore, although the two original grievants withdrew their claims, the arbitrator still had jurisdiction over the subject matter of the dispute.

The contract does permit and, in fact, mandates that an employee whose position is abolished displace a

less senior employee. Therefore, as a result of bumping, the effects of the original action spread outward, affecting an ever increasing number of individuals as they, in turn, are bumped out of their positions by someone with more seniority. All of those individuals have a vested interest in insuring that the employer acted properly when it abolished the original positions. Therefore, the employer's position is incorrect. The grievants who filed these grievances were as affected, if not more so, by the abolishment of the two positions as the individuals who held those jobs at the time and should have the right to challenge those abolishments.

The employer argued that the job abolishments were justified because the employees who held the positions performed substandard work. However, the employer never disciplined these employees for poor workmanship or incompetence, so that argument is meritless.

The contract does not permit abolishments to occur unless the employer has a specific rationale which it can prove by a preponderance of the evidence that the abolishments were justified.

ARBITRATOR'S OPINION:

Under contract article 25, the union is given authority to pursue grievances and bears the burden for deciding whether or not to pursue them to arbitration. The employee cannot invade the union's province or neutralize its role by withdrawing the grievance if the union believes that it should seek a resolution of the dispute through arbitration. Therefore, although the original grievants who were challenging their discharge from the positions of Air Quality Technician and Electrician had withdrawn their grievances, the union still had the authority to pursue these claims.

The state was correct in stating that the State Personnel Board of Review decision applies to this situation. That is, only employees first affected by job abolishments have a right to challenge the rationale for the abolishments. As applied here, the grievants do not have authority to challenge the abolishment of the positions of Air Quality Technician and Electrician because the grievants are after-affected employees. Moreover, the arbitrator concluded that the grievants were complaining about being bumped from their positions as a result of the abolishments and the subsequent displacement which flowed from that action. The union cannot use the grievances here as a means of challenging the rationale for the original abolishments.

Therefore, the state's position that the grievants had no authority to challenge the abolishments under the contract agreement must stand.

AWARD:

Grievances denied

TEXT OF THE OPINION:

IN THE MATTER OF ARBITRATION

BETWEEN

OCSEA, AFSCME Local 11, AFL-CIO,
Union,

and

State of Ohio, Department of Mental Health, Offices of Support Services, Dayton Mental Health Center,
Employer.

GRIEVANTS:

Stephen Thompson
23-08-(92-08-28)-0835-01-06
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OPINION AND AWARD

Appearances

On Behalf of the Union
Penny Lewis, Staff Representative, OCSEA
AFSCME Local 11, AFL-CIO
Patrick D. Mayer, Field Representative, OCSEA
AFSCME Local 11, AFL-CIO

On Behalf of the Employer
Timothy Wagner, Labor Relations Administrator,
Department of Mental Health

LAWRENCE R. LOEB, Arbitrator
55 Public Square, Suite 1640
Cleveland, Ohio 44113
(216) 771-3360

I. STATEMENT OF FACTS

On May 22, 1992 the Chief of the Office of Support Services sent a letter to the Department of Administrative Services as the first step in the process to abolish ten positions from the Centralized Food Processing Facility (CFP) at the Dayton Mental Health Center (DMH). Among those listed for abolishment was the Air Quality Technician 1, who was paid $34,484 per year, and the Electrician 1, who received $30,322 in compensation. In justification of the decision to abolish the ten positions, the Chief of the Office of Support Services pointed out that in July, 1991 the Centralized Food Processing Facility went from a cook-chill to a cook-freeze operation which allowed the Facility to extend the shelf life of its product and broaden its customer base. At the time the decision was made to change the nature of the operation, the CFP was losing approximately $500,000 annually. Management hoped the change in the way the food was prepared and stored along with the expansion of the Facility's customer base would stem the flow of red ink and save the facility. The change in the manner of food preparation, though, was also expected to result in a reduction in the number of people necessary to staff the Centralized Food Processing Facility and perform the work there. The ten positions set out in the letter were those which the Chief of Office of Support Services believed would no longer be needed because of the change.

What the May, 1992 justification didn't say was that the abolishment of the Air Quality Technician and

Electrician's positions had little or nothing to do with the change in CFP's method of food preparation. Because the incumbents in those positions were responsible for performing preventive maintenance and repairing the CFP's equipment, the switch in production really didn't effect them. However, Management noted in its review of the CFP's financial situation that it was spending between $40,000 and $50,000 annually for repairs and supplies over and above the $64,000 it paid to the Air Quality Technician and Electrician in wages and benefits. Since the CFP had a shared services agreement with Dayton Mental Health which called for the latter to perform certain repair and maintenance services at CFP, Management reasoned that it could realize significant savings by abolishing the Air Quality Technician and Electrician positions and shift the repair and maintenance work they would have performed to Dayton Mental Health.

In July, 1992 the Director of the Ohio Department of Mental Health notified the Union that nine of the ten positions listed in the May 22, 1992 job abolishment justification would be abolished. As rationale for the abolishment, the Director cited: 1) reasons of economy; 2) reorganization for efficiency; and 3) permanent lack of work. Twenty-one days after that letter was sent, the Employer notified the individuals occupying the Air Quality Technician 1 and Electrician 1 positions that their positions were being abolished effective September 5, 1992. Both men were reassigned as required by the Contract, finding positions at the Dayton Mental Health Facility. They nonetheless protested the abolishment of their positions, challenging the Employer's rationale for the decision to abolish their jobs.

The original abolishments and the subsequent realignment of the two individuals who held the positions of Air Quality Technician and Electrician resulted in a series of displacements as the employees who occupied the positions that those two individuals bumped, in turn bumped less senior members of the Bargaining Unit. All of the subsequent bumps or displacements were procedurally and contractually correct, as were the initial abolishments. Nonetheless, the six individuals who were effected by the realignment all filed grievances. Five of the six protests were almost identical, complaining that the abolishments were unjust and caused the employee to unduly lose his position. As relief, each Grievant sought to be reinstated to his former position and to be made whole. The sixth employee, Stephen Thompson, filed a different protest, complaining:

“On 8/24/92 I received lay-off notice from my position, as Maintenance Repair Worker II for reasons of economy. The amount of maintenance repair work will not decrease significantly and or will be sub-contracted. I have held positions as Psych Attendant and Hospital Aide within the last five years. PWLC is hiring interim TPW's off the street, for which I am qualified for, and was not offered. This is a violation of 18.11 and for these reasons I am aggrieved.”

Thompson's position of Maintenance Repair Worker II was not one of those listed in either the job abolishment justification or the notice of intent to abolish which Management had sent to the Union. Except for the wording of Thompson's protest, all six grievances were alike in that none questioned the rationale for the original abolishments and none, including Thompson's, challenged the decision to subcontract work at either the Centralized Food Processing Facility or Dayton Mental Health Center.

In questioning the Employer's action, all of the grievances cited Article 18 and Sections 124.321 to 327 of the Ohio Revised Code and Ohio Administrative Code Sections 123:1-41-01 through 22, which sections provide in pertinent part:

ARTICLE 18 -- LAYOFFS

18.01 -- Layoffs

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

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.

123:1-41-01 Layoffs

(C) If an appointing authority abolishes positions in the civil service, the abolishment of positions and any resulting displacement of employees shall be made in accordance with sections 124.321 to 124.327 of the Revised Code and the rules of this chapter of the Administrative Code.

123:1-41-04 Abolishment of positions in the classified service

(A) Reasons for abolishment. An appointing authority may abolish positions in the classified civil service for any of the following reasons: as a result of a reorganization for the efficient operation of the appointing authority; for reasons of economy; or for lack of work which is expected to be permanent. A lack of work shall be deemed permanent if it is expected to last more than one year.

(B) Determination and filing a statement of rationale and supporting information. the determination to abolish positions shall be made by the appointing authority.

State agencies and county offices. The appointing authorities of state agencies whose employees are paid by warrant of the auditor of state and of county offices shall file with the director a statement of rationale and supporting information for the determination to abolish positions. The statement of rationale and supporting information shall contain information as is available prior to the time the layoff notices are mailed or delivered to the employees to be laid off as a result of the abolishments.

The shared service agreement to which Management looked to fill the gap left by the abolishment of the two positions had been executed on August 1, 1991. It called for the Dayton Mental Health Center to provide certain services to the Centralized Food Processing Facility, including "where appropriate, maintenance repair to the building CFP occupied." The agreement further provided that if Dayton Mental Health Center was unable to perform necessary repair and maintenance services, then the Centralized Food Processing Facility was responsible for hiring outside contractors to perform the work. The primary responsibility for maintaining and repairing the Centralized Food Processing Facility's equipment, however, belonged to the Air Quality Technician and the Electrician. Neither the individual who held the Air Quality Technician's position nor the individual who held the Electrician's position at the time of the abolishments was ever cited for poor workmanship nor disciplined for failing to perform his job. However, the Facility experienced a significant amount of down time because of equipment malfunctions over the two years before the abolishments took place. The down time was particularly vexing to Management because it significantly reduced the CFP's ability to operate at a profit.

After the two positions were abolished, Management had intended to turn the repair and maintenance work of the Facility's equipment over to the DMHC under the shared service agreement. Management learned, however, that the two individuals whose positions had been abolished had bumped into the DMHC and would be responsible for doing repair work at the CFP under the shared service agreement. When they proved to be no more effective at keeping the equipment running than they had been when they were on CFP's payroll, Management began looking for an outside contractor to perform the work. After examining the CFP's equipment, the contractor notified Management on October 26, 1992 that it would not accept responsibility for maintaining the Facility's refrigeration equipment until twelve items were repaired at a cost of $6,975. Among other things, the contractor noted that its inspection of the Facility's refrigeration equipment revealed a bad condenser fan motor, a missing fan motor, missing oil pressure switch, bad compressor valves, bad fan bearings, the need to replace the crank case heater, a bad compressor and a locked up condenser fan motor. On March 23, 1993 the same contractor notified Management that it was prepared to enter into a maintenance agreement with the Facility, but that an analysis of the Facility's entire mechanical system revealed a number of problems which the contractor estimated would cost an additional $7,115 to repair. The contractor also noted that:

“The present state of the mechanical system as a whole, has shown signs of a lack of proper preventative maintenance procedures.”

Under the heading of "Summary," the contractor expanded on this belief, declaring:

“The previous in house staff lacked in proper preventive maintenance procedures, and there is many instances the control wiring has been rewired to satisfy an existing problem. When this happens the machinery is not operating as its supposed to, leading to premature failure, which results in unnecessary downtime to production.

The same is true to the HVAC (Heating, Ventilation, and Air Conditioning) system. Many items have been solved with "temporary bandaids" and equipment has been "jumpered out", in order to make it function. Whenever you alter original design, it can lead to very expensive repairs.”

After the $14,000 worth of repair work had been completed by the contractor, it entered into a one-year maintenance agreement with Management in 1993 at a cost of $50,028, which included testing, preventative maintenance, parts and labor.

Sometime during the course of the grievance procedure the initial Grievants, the Air Quality Technician and the Electrician, withdrew their grievances. The parties, however, continued to argue over the other six grievances, with the result that they eventually proceeded to arbitration. Prior to the commencement of the arbitration hearing, the Union subpoenaed the individuals who had held the Air Quality Technician and Electrician positions at the Centralized Food Processing Facility. One individual did not receive his subpoena because he was gone on vacation at the time delivery was attempted and the other, although served with the subpoena, refused to testify. The Union nonetheless introduced records the two men had maintained which it asserted demonstrated that they had provided regular preventative maintenance and repairs during their tenure with the Facility. The Union also argued that the following provisions of the Contract were applicable to this dispute:

ARTICLE 25 -- GRIEVANCE PROCEDURE

25.01 -- Process

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

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). . . .

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. . . .

Step 2 -- Intermediate Administrator

In the event the grievance is not resolved at Step One, a legible copy of the grievance form shall be presented in writing by the Union to the intermediate administrator or his/her designee within five (5) days of the receipt of the answer or the date such answer was due, whichever is earlier. . . .

Step 3 -- Agency Head or Designee

If the grievance is still unresolved, a legible copy of the grievance form shall be presented by the Union to

the Agency Head or designee in writing within ten (10) days after receipt of the Step Two response or after the date such response was due, whichever is earlier. . . .

Step 4 -- Office of Collective Bargaining Review

If the grievance is not settled at Step Three, pursuant to Step 3 B, the Union may appeal the grievance in writing to the Director of The Office of Collective Bargaining by sending written notice and a legible copy of the grievance form to the Employer. . . .

Step 5 -- Arbitration

Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by the Union by providing written notice to the Director of the Office of Collective Bargaining within thirty (30) days of the answer, or the due date of the answer if no answer is given, in Step Four.

II. POSITION OF THE UNION

Management's claims to the contrary, the Arbitrator does have jurisdiction to reach the merits of this dispute even though those whose positions were abolished in 1992 withdrew their grievances. In claiming that their action effectively robbed the Arbitrator of jurisdiction over the subject matter of this dispute, Management is deliberately ignoring a basic principle of collective bargaining that the Agreement is between the Union and the Employer and that it is the Union which is solely responsible for policing the Contract. The very name "collective bargaining" is indicative of that relationship and recognizes that the Contract is the product of an agreement between the Employer on one side and the Union acting on behalf of its membership on the other. Because the agreement is between the Union and the Employer, the ultimate responsibility for insuring that Management adheres to the terms of the Contract falls to the Union. That conclusion is not altered in any way because individual members of the Bargaining Unit have the right to institute grievances.

Their right, though, is not paramount to the Union's right and obligation to insure that Management follows the terms of the Collective Bargaining Agreement. Therefore, even if an employee, as the original two Grievants did in this case, decides not to go forward with his protest, the Union has the right under the Contract to do so if it believes that the issues are important enough to warrant proceeding to arbitration. That principle should not come as a shock to the Employer which agreed in Article 25.02 that the Union has the right to appeal grievances to arbitration. If, as the Employer now claims, an individual employee can decide whether or not to pursue a grievance, then logically the Employer should have demanded that that principle be memorialized in Article 25.02. It obviously did not. When it did not, it recognized that the Union as the collective embodiment of its membership could pursue grievances independently of the desires of any given member. Thus, it follows that even though the two employees whose jobs were abolished have withdrawn their grievances, their decision does divest the Arbitrator of jurisdiction to consider the merits of the dispute.

By the same token, the fact that the individuals whose jobs were abolished have not seen fit to pursue their challenges to the Employer's action does not mean that these Grievants and, therefore, the Union, cannot do so. Perhaps if there were no language in the Agreement permitting employees whose jobs are abolished to bump back into other positions, there might be some validity to the Employer's claims. However, the Contract does permit and, in fact, mandates that an employee whose position is abolished displace a less senior employee. Therefore, bumping, like a stone thrown into a pool, spreads the effects of the original action outward, effecting an ever increasing number of individuals as they, in turn, are bumped out of their positions by someone with more seniority. All of those individuals have a vested interest in insuring that the Employer acted properly when it abolished the original positions. To argue that they do not, as the Employer is doing in this case, is utter nonsense. The individuals who filed the grievances which are now under consideration were as effected, if not more so, by the abolishment of the two positions than the individuals who held those jobs at the time. Therefore, to prohibit these Grievants from challenging the basis for the original abolishments is to effectively strip them of any and all rights they may have under the Contract and leave them without any protection from arbitrary State action.

It takes little thought to realize that if the Employer's position is accepted, then all a State agency would have to do is find one or two compliant individuals and in collusion with them, abolish their positions allowing them to bump into some other classification. In this way the State could substantially effect a huge number of other employees who would be powerless to challenge the agency's action. Not only didn't the parties ever intend that result, but the Contract was designed to forestall the Employer from engaging in such conduct.

There is a good reason for the Employer's reluctance to permit the Arbitrator to reach the merits of this dispute as it is all too plain that the Management lacked sufficient rationale to abolish either of the two positions at issue. It is a given that the Employer simply cannot abolish positions whenever it feels the urge to do so. Rather, the Contract mandates that it must meet certain specific tests before it can act. In this case, it didn't come anywhere close to doing so.

Clearly, the evidence reveals that the Employer achieved no financial benefit other than saving the salaries of the two individuals whose positions were abolished. However, it is now well settled law that such savings alone are not a sufficient reason to justify abolishing a position. The Employer was well aware of this problem and so to get around it tried to argue that it would realize substantial savings as a result of a contract it entered into with an outside supplier. However, it didn't enter into that agreement until well after the abolishments took place. The Contract, though, requires that the Employer must be able to establish that there were sound financial reasons for doing away with a position prior to the time of the abolishments. It must not be allowed to use events which take place after the abolishment as a rationale to justify getting rid of the positions. This is especially so as the Employer had absolutely no idea at the time of the abolishments what, if any, savings would be reaped once the new contracts went into effect.

The Employer, perhaps recognizing the tenuousness of its argument, tried to argue that the abolishments were justified because the employees who held the positions just before they were abolished performed substandard work. The argument is pure nonsense as evidenced by Management's failure to ever discipline either or both of those individuals for poor workmanship or incompetence. Clearly, if the two individuals had performed their duties as badly as Management now alleges, then Management would have repeatedly disciplined them during the course of their employment. The fact that it did nothing, that it never once called either of those individuals on the carpet, makes a lie out of those allegations.

In the end, there is absolutely no justification whatsoever for the Employer's decision to abolish the two positions other than its desire to subcontract out work which, under the Contract, belongs to the Bargaining Unit. It was that decision and that alone which set in motion the events that culminated in abolishment of two positions and the subsequent dislocation of these Grievants. The Contract, however, does not permit such a flagrant abuse of power. Instead, it demands that the Employer have a specific rationale which it can prove by a preponderance of the evidence that the abolishments were justified. Since it cannot, it follows that the grievances should be sustained and the Grievants made whole.

III. POSITION OF THE EMPLOYER

Before deciding what is at issue in this case, it would be well for the Arbitrator to keep in mind what is not at issue because the latter is almost as important as the former. What is not at issue is the Employer's right to abolish a position where circumstances warrant taking that action. Those are laid out in the Ohio Revised Code and the Rules of the Department of Administrative Services. Second, there is no issue concerning the process Management followed in abolishing the two positions at the Central Food Processing Facility. There isn't because the Union stipulated that the bumping process which followed the abolishments was procedurally and contractually correct. There is also no question about what rights an employee has whose position is abolished. They can either accept the abolishment and be laid off, accept the abolishment and bump back according to the Contract, or challenge the abolishment through the grievance-arbitration procedure laid out in the Agreement. Finally, and perhaps most importantly of all, there is no question that in the past the Union has vociferously and successfully argued that decisions by the State Personnel Board of the Review (SPBR) and the courts are binding on the parties. There is certainly too long and too well known a history of action by the Union for it to now disavow those claims.

Yet, now the Union suddenly would disavow all such arguments, claiming that the Arbitrator should ignore

any decision by the SPBR. The reason for the Union's sudden change of heart is not hard to find or understand. It lies in the case of Williams v. Department of Administrative Services in which an Administrative Law Judge for the State Personnel Board of Review ruled that in an abolishment only the first effected employee, that is, the employee whose position was abolished, has the right to challenge the rationale for the abolishment. The Union is especially adamant that the Arbitrator overlook the Williams decision because it came before the Board, like these grievances, on the challenge of an individual who was bumped from his position and who sought to contest the rationale for the original abolishment. The Administrative Law Judge found that those after-effected employees did not have that right. Now the Union, after such a long history of pointing to the infallibility and brilliance of the State Personnel Board of Review, demands that the Arbitrator ignore the Williams decision. The Union cannot and should not be allowed to have it both ways.

If decisions by the SPBR should be considered in other arbitrations, then they should be considered in this one. This is especially so as there is no good reason to deviate from the reasoning the Administrative Law Judge applied or the decision he reached in that case. It takes little thought to realize the quagmire the Arbitrator would create if employees who were subsequently effected by an abolishment because they were bumped out of their positions had a right to challenge the rationale for the abolishment and were successful in doing so. At a minimum, their challenges would result in massive insecurity in the personnel system as employees would not be sure where they would be slotted or for how long. More importantly, allowing after-effected employees to challenge the rationale for an abolishment could cause absurd results as where an employee who accepted an abolishment and displaced another employee and was happy to be in that position was forced to go back into the position which was initially abolished, a position which he no longer wanted. Such situations are easy to imagine. They are nonetheless illogical and contractually prohibited because the only person who has a right to challenge the rationale for an abolishment is the individual whose position was abolished. Nothing else is acceptable in logic or under the Contract.

Even if the Arbitrator were to conclude that these Grievants had a right to challenge the rationale for the original abolishments, the grievance should still be denied as the Employer met the conditions under the Contract and the Code before it acted. While the Union may not want to recognize it, there were legitimate reasons for the Employer's decision to contract out work which had previously been done by the two employees. There can also be no question in view of the record that the two individuals whose positions were abolished had inadequately performed their duties. At best, they had done little more than put "bandaids" on serious problems. They had done almost no preventative maintenance and had not repaired any major problems with the result that the system limped along from breakdown to breakdown resulting in repeated periods of down time and economic loss. It is a mark of how poorly those two individuals did their jobs that the contractor needed to perform $14,000 worth of work just to bring the system up to operating condition before it would take it over.

Beyond those concerns, the Employer reaped significant financial savings as a result of the two abolishments. These were real, not illusory savings. Further, the true financial picture doesn't really emerge until a decrease in down time is factored in. When it is, it is readily apparent that the Employer had a sound financial basis for the decision to abolish the two positions. Because it did, it met its obligations under the Contract. Therefore, the abolishments should not be set aside unless the Union can establish by a preponderance of the evidence that the Employer acted in bad faith. As there is absolutely no evidence of that whatsoever, then it follows that the grievances should be denied. This is especially so as the Union never grieved the contracting out itself. Whatever else it may say, the fact of the matter is that that issue was never raised on the face of any of the grievances which are under consideration. Therefore, the issue of contracting out, which again the Employer had the right to do and had a legitimate reason to do, is not an issue in this matter and should not in any way alter the final conclusion that there is no basis for these grievances.

IV. OPINION

As the parties are all too well aware, it is impossible to decide the merits of this dispute without first

disposing of the Employer's jurisdictional challenges. The reason they must be is obvious. An arbitrator, like a judge, can only issue an enforceable order if he or she has the jurisdiction to do so. If the hearing officer doesn't, then regardless how well reasoned the decision maker's opinion may be or eloquent his words, the effort is totally wasted because he had no power to issue the opinion in the first place and should have never undertaken to do so. In the case of judges, their jurisdiction is defined by the legislature and may be limited by any number of factors, including geography, the nature of the controversy or the dollar amount at issue. In arbitration, the parties sit in place of the legislature and their effort, the collective bargaining agreement, substitutes for the statutory enactments through which a legislature speaks. The principle of jurisdiction, though, remains the same in both cases; there is no right to act nor power to do so in the absence of specific authority from the enabling body.

In this case, the Arbitrator derives his authority from Article 25, which defines a grievance as any disagreement arising out of an interpretation or application of the Collective Bargaining Agreement and further prescribes the steps the parties must follow in order to resolve the dispute. Unfortunately, the parties couldn't foresee every eventuality which might arise over the term of the Contract and, as a result, did not specifically address one of the two jurisdictional questions raised in this matter, whether the Union can prosecute a grievance if the original grievants have "withdrawn" it. It is easy to understand how the parties failed to address the issue. In the normal course of events, employees file grievances only when they believe that the employer has failed to follow the terms of the collective bargaining agreement and they have suffered a loss as a result of that failure. Because they have, the employee actively pursues the claim until it's resolved to his satisfaction or someone tells him that the matter can't be pursued further. Given the duty of fair representation to which Unions are held, it is not uncommon for an aggrieved employee to be able to push a matter to arbitration even though the Union leadership may believe that there is absolutely no hope of winning the dispute.

The key, though, is that it is the Union, not the employee who initiated the grievance, which bears the burden for pursuing the matter. It may be very true that in a particular case the employee, by raising the specter of a fair representation suit, can force the Union to pursue a matter it would not have voluntarily prosecuted if left to its own devices. Such cases, though, don't alter the underlying principle that the Union alone has the ultimate responsibility for deciding whether or not to pursue a grievance to arbitration. The reason it has is that the contract is between the Employer on one hand and the Union, as the collective embodiment of its membership, on the other. Thus, even though the Union, unlike the Employer, may represent hundreds of employees, it remains a separate and distinct entity, no different in standing from its monolithic counterpart.

Therefore, unless the Collective Bargaining Agreement provides otherwise, the Union has the exclusive right to decide which cases will not be prosecuted to arbitration and which ones may be withdrawn before arbitration begins. The Union, in short, has the right and the obligation to police the Contract and can only do so if it has the freedom to decide which cases must be prosecuted in order to maintain the integrity of the Collective Bargaining Agreement. The corollary of that principle is that unless the Contract provides otherwise, an employee who files a grievance cannot invade the Union's province nor neutralize its role by withdrawing the grievance if the Union believes that it should seek a resolution of the dispute through arbitration.

The Union is well aware of just how crucial it is to resolve this issue in its favor. What lies behind its concern is the Employer's claim that the grievants who were bumped from their position because of the original abolishments are "after effected employees" who have no right to challenge the rationale for the abolishment of the Air Quality Technician and Electrician positions. That right, Management asserts, belongs solely to the incumbents in those positions. Since they withdrew their grievances, the Employer concludes that the Arbitrator does not have jurisdiction to decide if Management violated the Contract when it abolished the two positions. In support of that argument, the Employer relies on a decision by the State Personnel Board of Review in the case of Williams v. Ohio Department of Administrative Services, Case No. 93-LAY02-0155, in which an Administrative Judge concluded that only the employees first effected by the abolishment have the right to challenge the rationale for the abolishment. Since the Union has repeatedly relied upon decisions by the State Personnel Board of Review in other cases, the Employer argues that it

must take the bad with the good and live with the Williams decision. For its part, the Union doesn't deny that decisions by the State Personnel Board of Review may not apply in certain situations, but argues that this is not one of them because the decision involves an exempt employee not covered by a Collective Bargaining Agreement. Further, it maintains that the decision isn't final and, therefore, should be ignored. Neither argument is persuasive.

The problem with the Union's first claim, that the Williams decision should be ignored because it concerns an exempt employee, is that the Administrative Law Judge based his decision on the same sections of the Ohio Revised Code and the Ohio Administrative Rules which are applicable to members of the Bargaining Unit. Specifically, he referenced Sections 123:1-1-41 of the Administrative Rules and 124.321(D)(2) through (4) and 124.324(A) of the Ohio Revised Code as the basis for his decision. These are the same code sections that are mentioned in Article 18.01 which states that:

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

Since the code sections the Administrative Judge relied upon as authority for his decision are identical to the ones referenced in the Contract, it makes no difference that the individual in the matter before him was an exempt employee instead of a member of the Bargaining Unit. Since the statutory authority is identical in both cases, where the employee stands in terms of being exempt or non-exempt doesn't matter. Likewise, the employee's position doesn't dilute the logic the Administrative Law Judge applied or his conclusion that only the first effected employee under the law has a right to challenge the rationale for an abolishment, after effected employees do not.

Since only the Air Quality Technician and Electrician positions were abolished and since these six Grievants are "after effected employees," it follows that they do not have standing to challenge the rationale the Employer used to support the abolishments. That conclusion stands regardless of how the Grievants worded or would have worded their protests. Thus, the fact that five of the six grievances failed to challenge the rationale for the abolishments on the face of the grievance forms doesn't strengthen the Employer's hand. By the same token, even if the employees had questioned the rationale for the abolishments the Union still would not be able to raise the issue because these Grievants are "after effected employees." It is their status which is controlling, not the language which appears on the face of the grievance forms. That conclusion isn't effected by the grievance filed by the Maintenance Repair Worker which, while on its face, appears radically different from the other five grievances, is essentially no different from any of the others and is really a complaint about being bumped rather than a challenge to the underlying rationale for the original abolishments.

The parties certainly did not treat the Thompson grievance differently from the other five. The Union made no specific reference to the Maintenance Repair Worker's position or sought to prove it had been abolished, let alone offer any evidence to challenge the abolishment. The Employer likewise ignored the issue, making absolutely no mention of the supposed abolishment in its presentation. Under the circumstances, the Arbitrator can only conclude that the Maintenance Worker was complaining of being bumped as a result of the abolishment of the Air Quality Technician and Electrician's positions and the subsequent displacement which flowed from that action. As such, the Union cannot use the Maintenance Worker's grievance as a means of challenging the rationale for the original abolishments.

If it is to be able to do so, it can only be by way of the grievances which were filed by the incumbents in the two positions at the time they were abolished. Unfortunately, both of those individuals "withdrew" their grievances bringing into question the Union's right to challenge the rationale for the abolishments. The Union vehemently argued that the attempted withdrawals were a nullity since the individual Grievants did not have the right or ability under the Contract to take that action. Instead, it maintained that once the grievances were filed the responsibility for prosecuting the grievances and the concomitant power to settle or withdraw them passed to the Union. The undersigned must agree with the Union.

After reviewing Section 25.02 it is clear that the parties placed the sole responsibility for processing a grievance through the various steps of the grievance procedure on the Union. Thus, every reference in that

section is to the Union presenting the grievance form or to the Union appealing it to the next step. The only exception to this procedure and the only possible basis to conclude that a grievant can withdraw his or her protest is in the final sentence of Section 25.05 in which the parties provided that if the Employer does not respond within the time specified in the Agreement, the grievant may file the grievance to the next successive step. This is the only such reference in the Contract and is completely at odds with Section 25.02 which lays out the steps of the grievance procedure and which speaks only of the Union having the power to act. That one aberration is not enough to overcome the unmistakable thrust of the rest of the section that the Union, not the individual grievant, is responsible for deciding whether or not to pursue a grievance. It certainly is not in light of the principle that the Contract is the product of an agreement between the Employer on one hand and the Union, as the collective embodiment of its membership on the other, a principle which means, in practical terms, that it is the Union's responsibility, not the individual member's, to police the agreement. The corollary of that principal is that while any member of the Bargaining Unit has the right to institute a grievance if he or she feels aggrieved by the actions of Management, the Union alone has the right to prosecute the grievance or if it believes it should not, to withdraw it.

The grievant, even though he or she may no longer wish to pursue the matter, has neither the power nor the right to stop the process. The employee can obviously make the Union's task almost impossible by refusing to cooperate, as the original Grievants did in this matter. Whether the employee chooses to participate or not, though, doesn't change the fact that it is the Union alone which has the right to pursue a grievance or not. Since the Union didn't withdraw either of these grievances, they remained valid, the Grievants' actions notwithstanding.

Deciding that the Union has a right to question the rationale for the abolishments, though, doesn't mean that the grievances must be sustained. Far from it, as there was adequate evidence in the record to establish that the Employer had valid reasons to abolish the two positions at issue. That conclusion isn't effected by the fact that the Employer did not enter into the maintenance agreement with the outside contractor until well after the abolishments were effective. The Union is correct that the Employer cannot justify an abolishment by what it learns or does long after the abolishment has taken place.

In making that argument, though, the Union has lost sight of the fact that the Employer only started to look for an outside contractor after its initial plan, the one it used to justify the two abolishments failed. Specifically, the Employer sought to justify the abolishments by having the work which the incumbents in the two positions were supposed to perform taken over by the staff of the Dayton Mental Health Center under the shared service agreement which had been in effect since at least 1991. By having the work performed by the DMHC, the Employer hoped to save not only the salaries and benefits it would have had to pay to the Air Quality Technician and Electrician, but also the $40,000 to $50,000 which it had paid for repair work and supplies in the two years prior to the abolishments. Those costs were made necessary by the inability of the incumbents in those two positions to perform all of the work which the CFPF needed because they lacked the ability or the certification to do so.

While the theory underlying the Employer's plan was sound, reality, as is so often the case, did not fit the theory. In this case, the plan fell apart when the DMHC sent the same two individuals to work at the CFPF under the shared service agreement who had been in the Air Quality Technician and Electrician positions before the abolishments. Management was no better off than it had been before so it was at that point that it began to cast about for an outside contractor to perform the work.

Management argues that it has the right to contract out work under certain circumstances and went to great lengths to justify the decision to do so in this case. The argument misses the point, though. It is not the validity of that decision which is at issue here. Rather, the question is, did the Employer abolish the two positions for reasons of economy based upon the facts as they existed when the decision to abolish the positions was made? If the intermediate step of transferring the work in question to the DMHC under pre-existing agreement had not occurred, then there would have been no justification for the abolishment of either position, the savings realized from any subsequent subcontract notwithstanding.

Because the evidence does support the Employer's rationale that it would reap significant savings as a result of abolishing the two positions and shifting the work to the DMHC under an existing agreement, Management's decision must stand. The fact that the plan later fell through requiring the Employer to seek

another solution to the problem, one which was even more cost efficient than its initial one, doesn't alter that conclusion.

V. DECISION

For all of the foregoing reasons, the grievances are denied.

LAWRENCE R. LOEB, Arbitrator
Date: August 9, 1994