OPINION AND AWARD
Grievance No. 33-00-20060425-0045-01-05

In the Matter of the Arbitration

- between -

State of Ohio,
Ohio Veterans' Home Agency

- and -

The Ohio Civil Service Employees
Association, AFSCME Local 11

#963

Arbitrator: John J. Murphy
Cincinnati, Ohio

For the Agency:

Donna Green
Labor Relations Officer
Ohio Veterans' Home Agency
3416 Columbus Avenue
Sandusky, Ohio 44870

For the Union:

Robbie Robinson
Staff Representative
OCSEA, AFSCME Local 11
390 Worthington Road, Suite A
Westerville, Ohio 43082

BACKGROUND:

Early in 2006, the Agency issued an announcement to all persons in its staff that Naomi Twine "has been selected as the EEO Officer for the Ohio Veterans' Home Agency." Ms. Twine was at that time and is currently employed as an Administrative Assistant 3--an exempt position--a classification, the incumbents of which are not represented by the Union.

Ms. Twine's new duties were added to those duties otherwise set forth in the classification of Administrative Assistant 3 as issued by the Department of Administrative Services of the State. It is undisputed in this record that these new duties are, and always have been, part time in nature requiring an average of two hours or less per week on EEO related matters. The remaining 95% of her time is spent on her duties as Assistant to the Superintendent of the Agency.

This announcement prompted the filing of a grievance signed by the President of Chapter 2200 representing the bargaining unit members at the Agency. The grievance stated:

> Grievant feels that Naomi Twine, an exempt employee, should not be doing bargaining unit work. This is an erosion of the bargaining unit.

The remedy sought was: "For this action to stop immediately. To be made whole."

The Agency's response to the grievance stated in pertinent part:

> Naomi Twine was given an added duty as an EEO Officer, as this position has always been an exempt position. There is no erosion of the bargaining unit when the position was never a bargaining unit position. . . .

Following denial of the grievance, the case was brought to arbitration.

SPECIAL PROCEDURE IN THIS ARBITRATION

The parties agreed to waive a hearing that had been scheduled for March 28, 2006. In the place of the hearing, the parties presented written briefs with largely undisputed facts to which exhibits were attached. In addition, they accorded the arbitrator the privilege of a telephone conference call, if necessary, to clarify matters raised in the briefs and to secure information considered relevant by the arbitrator.

The telephone conference call occurred on April 10, 2006 with three representatives from each party combined for the call. The Union was represented by R. Robinson and D. Long of the OCSEA, as well as Mark Weikle, President of Chapter 2200, and the Grievant who filed the matter involved in this arbitration. The Agency was represented by D. Green and G. Kowalski, as well as J. Trejo of the Office of Collective Bargaining. Matters were clarified and additional written documents were presented and received by the arbitrator on April 14, 2007- -the date on which the record in this case was

closed and the time period under the contract for the production of the opinion began.

Whenever a scheduled arbitration hearing is waived and the proceeding is confined to the production of written arguments and documents for the arbitrator, the question of fairness to individuals whose interests may be personally affected by any award emanating from the arbitration is present.

In this particular case, the Grievant's statement did seek a make whole remedy that could conceivably benefit individual members of the bargaining unit. On the other hand, the Union's brief withdrew the request for the make whole remedy and limited its request for an order prohibiting the Agency from assigning the disputed duties to management personnel. "The only remedy the Union seeks is an order stopping the Agency from having the duties of this position performed by management personnel, i.e., a cease and desist order." (Union post-hearing brief at 1).

Any doubt about the fairness of this procedure is further resolved by the submission of a sworn affidavit by the named grievant, waiving his right to have the grievance heard in person before an arbitrator. The Grievant named in the grievance was the president of Chapter 22, Mark Weikle, and his sworn affidavit stated:

Affidavit

1. I am the grievant in Grievance 33-00-200060425-0045-01-05.

2. I am aware that I am entitled to have my grievance heard in person before an arbitrator.

3. This grievance is currently scheduled to be heard before Arbitrator John Murphy.

4. I am knowingly waiving my right to have the arbitration heard in person before and arbitrator and agreeing to have an Arbitration Brief submitted in lieu of an in person hearing.

ISSUE:

Since issues were not proposed in the written briefs, the arbitrator requested that the parties propose an issue during the course of the telephone conference call. The Union proposed the following: "Did management violate the contract by not filling the position of EEO Officer with a bargaining unit member?" The Agency responded with the following: "Did management violate the contract by giving duties previously performed by exempt employees to an exempt employee?"

As expected, these proposed issues incorporate the major points of the respective arguments of the parties as more fully set forth below. The parties left to the arbitrator the formulation of the issue in this case, and it is as follows:

> Whether the Agency's assignment of duties within the GAS EEO Officer classification series 6913 to an exempt employee was consistent with the collective bargaining agreement. If not, what should the remedy be?

RELEVANT CONTRACT PROVISIONS:

1.05 - Bargaining Unit Work

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

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

In addition, supervisory employees shall only do bargaining unit work under the following circumstances: in cases of emergency; when necessary to provide break and/or lunch relief; to instruct or train employees; to demonstrate the proper method of accomplishing the tasks assigned; to avoid mandatory overtime; to allow the release of employees for union or other approved activities; to provide coverage for no shows or when the classification specification provides that the supervisor does, as a part of his/her job, some of the same duties as bargaining unit employees.

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

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

POSITIONS OF THE PARTIES:

A.) Union Position

The first position of the Union is that an EEO Officer is a bargaining unit position and there can be "no argument" about this assertion. This position is currently listed on page 226 of the collective bargaining contract, and it is listed as a position in bargaining unit 14. Despite this contract language, and in violation of it, the Agency announced that a person

holding an exempt position had "been selected as the EEO Officer of the Ohio Veterans' Home Agency."

In addition to the fact that EEO Officer is a named classification within the bargaining unit, the Agency is circumventing the purpose of this classification. It is to "assure compliance with equal opportunity and affirmative action government regulations." On the other hand, the Agency is diminishing the effectiveness of this position "by squeezing it into the tail end of a manager's . . . preexisting responsibilities as an afterthought."

The third position of the Union arises out of the language of Article 1.05[1/] of the contract entitled "Bargaining Unit Work." The Union urges the adoption of an analysis of this Article set forth in an arbitration decision by Arbitrator Harry Graham issued on November 12, 1988.

The Union's view is that the analysis by Arbitrator Graham could lead to at least two conclusions. First, the amount of bargaining unit work performed by supervisors was increased

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[1/] Arbitrator Graham's analysis refers to an Article numbered 1.03. During the telephone conference call with the parties and the arbitrator, it was determined that the language found in Article 1.05 of the current contract between the parties--the language to be applied in this case--was identical to the language that was considered by Arbitrator Graham in 1988.

during the contract and that the Agency did not make reasonable effort to decrease the amount of bargaining unit work done by supervisors.

Lastly, the Union raises a policy consideration against the assignment of EEO officer duties to an Assistant to the Superintendent. According to the Union, violation of civil rights and discrimination in the workplace are "usually committed by management against those that they supervise, usually bargaining unit members." Therefore, giving the duties of investigation of these matters "to the Superintendent's first lieutenant" would place a chilling effect on bargaining unit members.

B) Agency Position

With respect to the Union's argument based upon the contract references to "EEO Officer," this reference should be examined in light of the State's classification series "EEO Officer" which includes six different class titles, only two of which (EEO Technician and EEO Officer) are bargaining unit positions. The term "EEO Officer" is, according to the Agency, "generic in nature and can be attributed to anyone holding any of these six class titles."

Moreover, the responsibilities of Ms. Twine are akin to those that are set forth in the classification titles that are

exempt. For example, she has the responsibility of "representing the Agency at hearings conducted by the Ohio Civil Rights Commission and the U.S. Equal Employment Opportunity Commission when necessary."

With respect to Article 1.05, most of the language of the Article appears to apply to the limited situation of "supervisors actually performing the work of those they supervise." The Agency asserted in its brief that "in the case at hand, Ms. Twine is not a supervisor."

The Agency then assumed for purposes of argument that Article 1.05 could be read to apply to performance of bargaining unit work by any exempt employee and not just by supervisors. In that event, this Article permits supervisors to perform bargaining unit work "to the extent that they have previously performed such work." On the facts in this case, the duties of EEO Officer have "always been performed by exempt employees." Therefore, Article 1.05 does not support the Union's grievance.

Lastly, the Agency raises a policy consideration. The Agency asserts that "discrimination complaints often involve allegations of sexual harassment of one worker by a co-worker, both of whom are Union members." As a consequence, the EEO Officer, after conducting an investigation, would make recommendations for disciplinary actions. Since this would be particularly difficult if the EEO Officer is also a member of

the Union, it would "be better for all involved if the recommendation comes from management.

OPINION:

This opinion is divided into three parts to reflect the three major divisions between the parties. The first concerns classification language in the collective bargaining agreement and the extent to which that language and the Agency's announcement of the filling of the challenged position show that the position is in the bargaining unit. The second turns to the policy consideration by the parties; the Union, arguing that the position should be held by a Union member; the Agency, pressing that the position should be held by a management representative. Finally, we turn Article 1.05 of the contract and its application to the facts in this case.

A.) Classification Language

The Agency's announcement that N. Twine would serve as "EEO Officer" does not--in and of itself--constitute an announcement that she is occupying a class title belonging to the bargaining unit.

During the telephone conference call, the parties agreed that the collective bargaining contract incorporates class titles of the State's Department Administrative Services that are in the bargaining unit certified by SERB and represented by the Union. As the Union noted, "EEO Officer" is a class title

listed as one in Bargaining Unit 14 and appearing on page 226 of the collective bargaining contract. The parties also agreed that the Department of Administrative Services has other class titles that are not referred to in the collective bargaining contract such as the one occupied by N. Twine—"Administrative Assistant 3."

The difficulty with the Union's argument based on classification language is that the phrase "EEO Officer" is used by DAS for two distinct purposes. One denotes a Classification Series. It is Series 6913 and comprises nine pages setting forth six separate Class Titles and Class Numbers.

The first page of Series 6913 refers to the six Class Titles as in lower, middle and highest levels. There then follows a description of the six Class Titles, two of which are in the bargaining unit--EEO Technician and EEO Officer; four of which are exempt and not within the bargaining unit.

The second purpose, therefore, of the phrase "EEO Officer" is to denote one of the two lower level Class Titles that belong within the bargaining unit.

The Agency's use of the phrase "EEO Officer" in its announcement of filling the position by N. Twine, cannot, therefore, in and of itself be a basis for a claim that the duties to be performed by Twine are bargaining unit duties.

Indeed, the record concludes a representation by the Agency of her responsibilities:

> She has responsibility for conducting EEO training, investigating highly complex and sensitive cases, preparing reports based on her own investigations, and representing the Agency at hearings conducted by the Ohio Civil Rights Commission and the U.S. Equal Employment Opportunity Commission when necessary.

These duties are akin to the EEO Manager class title--one of the four exempt class titles that are within the DAS classification Series 6913 entitled "EEO Officer."

B.) Policy Considerations

Both parties posed what they considered to be the predominant conflict over which a person in the EEO Officer classification Series 6913 would conduct investigations and make recommendations. The Union views the predominant conflict to be one concerning complaints by bargaining unit employees against exempt employees; the Agency posed the predominant conflict as one involving Union members. From these conflicting positions, the parties based their argument on who should be the "EEO Officer"--bargaining unit member or exempt employee.

The questions of who should perform these duties and to whom they should be assigned are interesting questions that are far beyond the scope of an arbitrator's duties. These questions are posed by the parties as original questions requesting the arbitrator to act in a legislative fashion. The contract limits the arbitrator to "disputes involving the interpretation,

application or alleged violation of a provision of the Agreement . . ." (Article 25.03). The contract does not give the arbitrator the authority to consider and answer questions that appeal only to the arbitrator's personal sense of what is fair or what is just.

C.) Article 1.05

It is correct, as argued by the Agency, that most of this Article protects and preserves bargaining unit work from intrusion by supervisors. On the other hand, the last sentence in Article 1.05 appears to broaden this work preservation clause by establishing a duty on the part of the Agency to recognize the integrity of the bargaining unit and not take any action for the purpose of eroding it. This contractual duty is not limited to the use of supervisors as the instrument for the erosion of the bargaining unit.

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

We are left with the question of whether Ms. Twine was a supervisor--a conclusion denied by the Agency, but a subject about which the record is not ample. However, invited by the Agency's own assumption for purposes of argument that Ms. Twine was a supervisor, we will consider the application of Article 1.05 and the interpretation of this Article by Arbitrator Harry Graham.

Arbitrator Graham was confronted with a factual situation for the application of Article 1.05--a provision considered by Arbitrator Graham to be a "work preservation clause." (OCSEA and the State of Ohio, Department of Mental Health Case No. G-86-1107 at p. 9). A Union member, Favret, performed duties for the Department of Mental Health in a SERB certified bargaining unit classification--Mental Health Administrator 3. He took a leave of absence and the department filled the position temporarily. The Agency then posted a vacant position for a classification not within those represented by the Union--Health Facilities Standard Supervisor (HFSS). Arbitrator Graham found that the bulk of the duties assigned to the person in the newly filled exempt classification were largely similar to those performed by Favret who formerly worked in the bargaining unit classification.

Arbitrator Graham noted that the parties in Article 1.05 had "carefully negotiated the circumstances under which supervisors may perform bargaining unit work." (Id. at 9-10). Those circumstances are listed in the third paragraph in Article 1.05 quoted verbatim above.

Arbitrator Graham, however, noted that the language setting forth the circumstances under which supervisors may perform bargaining unit work was subject to the first sentence in the second paragraph of Article 1.05:

> Supervisors shall perform bargaining unit work to the extent that they have previously performed such work.

In the facts of the case before Arbitrator Graham, the arbitrator found that no supervisor had previously performed the work now being performed in the newly filled supervisory classification. While the supervisory classification had been in existence, it had not been previously filled. (Id. at 10).

The opposite is true in this case. Even the Union acknowledged in its brief that the position of EEO Officer has not been filled by a bargaining unit member. Rather, as the Union acknowledged, the responsibilities of EEO Officer at the Agency "have always been performed by management . . ." (Union brief at 2).

Arbitrator Graham made a second application of Article 1.05 to the facts before him. He found that when the vacant supervisory position was newly filled, many of the tasks performed by the supervisor "had also been performed by Mr. Favret"--the bargaining unit member operating within a bargaining unit classification. Arbitrator Graham's ruling was as follows:

> As this is the case, it is clear that the amount of bargaining unit work performed by supervisors has increased. This is contrary to the stricture in Article 1.05 which provides that the amount of bargaining unit work performed by supervisors shall not increase during the life of the agreement. (Id. at p. 11).

Again, the opposite is true on the facts in this case. In this case, the duties of EEO Officer at the Agency--albeit part time--have always been performed by management personnel. In this case, the amount of bargaining unit work performed supervisors has not increased.

We turn now to the last paragraph which constitutes one sentence and prohibits the Agency from taking action for the purpose of eroding the bargaining unit represented by Chapter 2200. The action involved in this case, the assignment of duties to an exempt employee as EEO Officer is the same action that the Agency has taken over the past several years. Indeed, the Agency listed four exempt managers who are still employed with the Agency who have performed the duties claimed by the Union. Therefore, the action taken by the Agency challenged in this case is identical to the action that the Agency has taken several times over the past several years. As a consequence, this record is simply devoid of any basis upon which to claim that the Agency did take action for the objective or the purpose of eroding bargaining unit work.

AWARD:

The grievance is denied.

Date: April 22, 2007

John J. Murphy
Arbitrator