ARBITRATION DECISION NO.:
142

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

EMPLOYER:
Ohio Department of Administrative Services

DATE OF ARBITRATION:
May 23, 1988?

DATE OF DECISION:
August 17, 1988

GRIEVANT:
Angus Dunn

OCB GRIEVANCE NO.:
G-86-0335

ARBITRATOR:
Frank Keenan

FOR THE UNION:
Daniel S. Smith

FOR THE EMPLOYER:
Jack Burgess, Chief of Arbitration Services, OCB

KEY WORDS:
Seniority
Bargaining Unit Work

ARTICLES:

FACTS:

Grievant is employed with the Division of Computer Service in the Ohio Department of Administrative Services as a Computer Operator 2. Grievant has been employed with the Department of Administrative Services for a thirteen (13) year period. The grievance was brought to protest the performance of bargaining unit work by supervisors and the performance of supervisory functions by bargaining unit employees (on the main console system of the computer services operations division).

EMPLOYER'S POSITION:

Management contends that it is the Union's burden to prove a violation of the contractual provisions. The contractual violations alleged must have occurred at the time the grievance is filed. The Union cannot prove violation by the State because none has occurred. The State asserts that it is undisputed that supervisors have been doing the work in question. It is well within management's rights to make specific job assignments and to assign employees to specific machines and specific tasks. These rights are not only traditional and well established, but are also incorporated into Article 5. It is the Employer's position that nothing in the contract alleviates these rights.

UNION'S POSITION:

The Union contends that Article 1, Section 1.03 is being violated, because bargaining unit work is being performed by supervisors. The classification specification for the incumbent supervisors does not provide for the operation of the mainframe computer as a job duty. Although historically, supervisors may have operated the main frame, that history is irrelevant. There is nothing in the operations of the mainframe which makes such work by its very nature "supervisory", and at best the State can merely establish that mainframe operation is complex and stressful. The union requests that following a reasonable transition period, non-bargaining unit employees be prohibited from operating the mainframe computer console.

ARBITRATOR'S OPINION:

Through a review of the facts presented, the Arbitrator determined that Section 1.03 of Article 1 precludes the performance by supervisors of the bargaining unit work of operating the main console of the computer. In order to effectuate the contractual mandate (bargaining unit work must be performed by bargaining unit employees), bargaining unit employees must be trained, retrained, or hired to meet the current need for mainframe operations. The grievance was, therefore, sustained to the extent that it was found that having supervisors perform bargaining unit work constitutes a violation of the contractual agreement.

AWARD:

Remedy, in the form of a reasonable transition period, allowing for the preparation of bargaining unit employees to operate the mainframe to meet the employer's need will be implemented. The Employer is also ordered to cease and desist from performing such work.

TEXT OF THE OPINION: * * *

ARBITRATION

BETWEEN

STATE OF OHIO,
DEPARTMENT OF ADMINISTRATIVE SERVICES

and OCB Grievance No. G86-0335

OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, LOCAL 11, A.F.S.C.M.E., AFL-CIO

APPEARANCES:

For the State:

Jack D. Burgess, Chief
Arbitration Services
Office of Collective Bargaining
Columbus, Ohio

For the Union:

Daniel Scott Smith, General Counsel
O.C.S.E.A. Local 11
Columbus, Ohio

OPINION AND AWARD OF THE ARBITRATOR

Frank A. Keenan
Panel Arbitrator
* * *

Statement of the Case:

This case, well presented by the parties' representatives, involves a grievance filed on August 11, 1986, by Computer Operator 2, Angus Dunn, herein the Grievant, an employee of the Division of Computer Services within the Ohio Department of Administrative Services. The Division provides various computer services, such as payroll preparation, for the various Departments of the State, A plenary hearing was held in Columbus, Ohio, on May 23, 1988, resulting in a voluminous record compiled from the testimony of some eight (8) witnesses[1] and several pieces of documentary evidence, Much of the record was expended on somewhat tangential matters and points of clarification on such tangential matters. What follows is a summary of the critical evidence necessary to a disposition of the grievance.

The grievance itself recites in pertinent part as follows:

"Subj: Step 2 Grievance
Articles 1.03 - Bargaining Unit Work and
16 - Seniority

Article 1.03 - Bargaining Unit Work

The first shift supervisors are doing bargaining unit work on the mainframe. The amount of bargaining unit work done by the supervisors should be reduced.

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[1] Testifying on behalf of the Union were: the Grievant, Angus Dunn; Charles Studebaker; Stephanie Pina; Jeffrey Hodges; James D. Hayman; and Allyne Beach. Testifying on behalf of the State were: Ron Vidmar and William Kline.

Article 16 - Seniority

Employees on the first shift in the similar classifications with the lesser seniority are performing the work normally performed by those employees with the majority seniority; thus disregarding the rights of the employees and promotes nonharmonious relationships among the bargaining unit employees.

Resolutions Desired

1. Employees be placed on the mainframe as in the past.

2. Promote on job training to bargaining unit employees in order for them to be educated properly on the mainframe.

3. Bargaining should be employees with the upper seniority should be placed on the mainframe before lesser employees.

The grievance worked its way through the grievant procedure and at the step just prior to the instant arbitration, namely, Step 4, it was denied ". . . for the reason cited at Step 3." The State's rationale for denying the grievance at Step 3 is embodied in a memo dated September 29, 1986, from Labor Relations Specialist Shirley Turrell, acting as designee for Director William G. Sykes, which in pertinent part states as follows:

Greivant's Contention:

Mr. Dunn originally grieved all alleged violation of Contract Articles: 1.03 - "Bargaining Unit Work," 16.0 - "Seniority" Definition.

At the review meeting, Mr. Dunn's representative asked to include additional Articles, as follows: Article 2.01 - "Non-Discrimination"; Article 19.12 - "Pre-positioning"; Article 11.08 - "Working Alone." Because there seemed to be confusion regarding what had been raised at Step I, due in part to a change of stewards representing the Grievant, we will agree, for this grievance only, to consider the issues not included in the Union's written statement of tile Step Ill Grievance.

Mr. Dunn, a 13 year employee of the Department of Administrative Services, contends that 1st shift Computer Operator Supervisors are performing bargaining unit work oil the main console ("main frame") system of the Computer Services Operations division, and that a bargaining unit employee is performing supervisory functions in the same area, all in violation of Article 1.03.

Additionally, Mr. Dunn contends that Article 16 has been violated in the assignment of personnel to the "main frame" and asks that employees be placed on the "main frame" in seniority order; and that he, specifically, be assigned to the "main frame." During the review meeting, Mr. Dunn stated that prior to 1984 he arid approximately 6 to 10 other Computer Operator 1's and 2's had been assigned to the main console on a rotating basis. In 1984, he and the 6 to 10 others were assigned to work primarily in support areas, mounting tapes and working in the Print Room as before, but no longer were rotated to the "main frame" console.

Management Contention:

Investigation confirms that Operations support group restructuring did take place in 1994. At that time new emphasis was placed upon improved response time for the main console system user problem resolution function, and problem determination. The operations main console "Help" user service is a highly specialized function, maintained it) a high security area, which controls the computer systems and statewide data links for critical users Such as the Lottery, Patient Care Systems, Welfare System and support systems in Georgia. Because response time is crucial and because timely response requires "on the spot" judgments to be made, successful operators display an overlap of strong functional and managerial skills. In 1984, it was deemed necessary that Computer Operator Supervisors would work along side operators assigned to the main console. This practice has continued and it is management's position that it is essential to meet Computer Services' mandate to maintain uninterrupted service to users statewide.

Decision: Articles 1.03 and 16.0:

On the allegations of violation of Articles 1.03 and 16.0, I find that the grievant and Union have failed to show any contractual violation, for the following reasons:

1) Supervisors have been performing the functions now performed, for at least 2 years prior to the contract effective date.

2) Article 16.0 (Seniority Definitions) does not address the assignment of personnel.

3) The assignment of personnel to specific projects is expressly the prerogative of

management, pursuant to Article 5, AFSCME Contract and ORC chapter 4117.08 (C) 1-9.

The original grievance, based on Articles 1.03 and 16.0 is denied.

Recommendation:

Because we are sensitive to the frustration expressed in this grievance, it is recommended that the topic of assignment to projects be reserved arid held to be appropriate for future Labor/Management Committee meetings.

The positions which currently staff the main console operation are examples of specialized technical positions in Computer Services which are not well addressed by current Classification Specifications. Within the context of the AFSCME/OCSEA Contract Classification Study, it has already been asked that these positions, as well as others used by Computer Services, receive primary consideration for review.

Decision; Articles 2.01; 11.08; and 19.12:

. . ."

Suffice it to say that the record amply supports the assertions in "Management Contention" to the effect that the main console for the User Help Desk service is a vital operation, and that a practice of supervisors operating the main console, dating back to 1984, in addition to bargaining unit employees operating it, has evolved. As State Exhibit #2 recites: **4**

"The user help desk is the focal point in the system for all end users with problems: operational, functional, procedural, or administrative.

When users exhaust the procedures or expertise at a remote site, they should seek assistance from user help desk. The help desk should be staffed with individuals possessing good communication skills and knowledgeable of the application programs, procedures, and Information System administrative requirements . . . .

The primary task of the user help desk is to respond quickly and efficiently to the concerns of the users. Helping with procedures, answering questions on application usage, routing calls to operations or technical support are some of the services rendered. . . ."

Ancillary to the mainframe or console help desk is the tape room and print room functions. While terminals at both of these latter locations can give most of the directions to the computer as can be given at the main console, in practice such directions are not given. Prior to 1984 the Grievant rotated between the mainframe, tape room, and print room functions in the Division. Due to the restructuring in 1984, he, along with certain other bargaining unit employees, no longer rotated onto the main console. In this regard the classification specification for the bargaining unit position of Computer Operator II, as is the Grievant, provides inter alia, that an incumbent "operates and monitors computer." Similarly, the classification specification for the bargaining unit

position of Computer Operator I provides inter alia that the incumbent "operates and monitors computer on pre-scheduled production runs." The Classification specifications for supervisory personnel in the Division, namely, Computer

Operations Supervisor I, and Supervisor II, does not so provide; rather, in pertinent part, the classification specifications for these positions simply provides, respectively, as follows:

> "Supervises and performs clerical and technical tasks related to computer operations and technical aspects of data processing (e.g., troubleshoots and arranges repairs on equipment; performs maintenance on machines; balances input and output; logs production; orders supplies.) . . .
>
> Trains, instructs and assists computer operators [Supervisor 1]
>
> "Supervises and perform clerical and technical tasks related to computer operations and data processing (e.g., inventories, orders, and maintains supplies and equipment; designs forms; prepares bid specifications).
>
> Supervises training of employees . . ."
> [Supervisor 2]

The record amply supports the conclusion that operation of the mainframe requires greater skills than is required to work in the tape or print rooms, and this being so, Division management has historically, at least since 1984, assigned its -most skilled personnel to the main console tasks.

The Division's operations are twenty-four hours (three shifts) and seven days a week. The Union perceived as a problem a dearth of supervisors on weekends and urged at Labor Management Committee meetings that weekend supervision be augmented. However, no formal grievance in this regard was ever filed. Nevertheless, motivated at least in part by this Union expressed concern, management promoted two bargaining unit employees who had been, as bargaining unit employees, working on the mainframe, to supervisory positions, on the first shift. Consequently, at the time of the hearing, on first shift no bargaining unit

employees were working on the mainframe; the former bargaining unit employees, now supervisors, continued to do so, however. The record reflects that management perceives no obligation to change this arrangement, and it does not intend to put bargaining unit employees to work on the mainframe on the first shift. As was explained at the hearing, there are distinct head count limitations; it perceives no contractual reasons to do so; and the best qualified personnel (currently supervisors) are already assigned to the task.

To be noted is the fact that mistakes made on the main console during the second and third

shifts have a less serious impact than those made on the first shift, and generally, first shift operations involve a greater level and degree of responsibility, than is required of operations of the main console during the second and third shifts.

Finally it is noted that the parties entered into two stipulations, as follows:

"1. The grievance is properly before the Arbitrator.

2. Article 5 incorporates 4117.08 (C) 1-9 (of ORC) into the contract (as opposed to the reference in the Agreement itself to ORC 4117.08 (A) 1-9)."

Relevant Contract and Statutory Provisions:

See Appendix I. **7**

The Parties' Positions:

a). The Union's Position:

The Union takes the position that Article 1, Section 1.03 is being violated by DAS because bargaining unit work within the Division of Computer Services, to wit, the "main frame's" operation, is being performed on the first shift, by supervisors. Contrary to the State's contention that paragraph one of Section 1.03 sanctions such, the Union contends that paragraph one is quantitative and paragraph two, upon which it principally relies, is qualitative. According to the Union it is paragraph two which is governing and dispositive of the grievance. In this regard the Union points out that the "classification specification" for the incumbent supervisors operating the mainframe on first shift does not provide that operation of the mainframe computer is a duty. The Union contends in essence that while historically supervisors may have operated the computer, such is irrelevant, for under paragraph two of Section 1.03 such a function is not spelled out in the classification specification, and hence cannot be recognized under the contract as legitimate. Still further in this regard, the Union brings to the Arbitrator's attention provisions of Ohio Revised Code at 124.14 which provide that "the director of administrative services, with the approval of the state employee compensation board . . . shall describe the duties and responsibilities of the class and establish the qualifications for being employed in that position, and shall file with the secretary of state a copy of specifications for all

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of the classifications. New, additional, or revised specifications shall be filed with the secretary of state before being used . . .," and asserts in essence that this Code provision serves to bolster its implicit contention that the contract contemplates that the classification specifications be literally construed.

The Union additionally contends that nothing in the operation of the mainframe makes such work by its very nature "supervisory," and that indeed the State has at best merely established that mainframe operation is complex and stressful.

By way of remedy the Union requests that, following a reasonable transition period during which the State shall provide training in the operation of the mainframe computer during first shift to bargaining unit computer operators, non-bargaining unit employees be prohibited from operating the mainframe computer console. Additionally, the Union requests that the Arbitrator retain jurisdiction for purposes of policing the remedy requested.

b) The State's Position:

The State takes the position that ". . . it is the Union's burden . . . to prove a violation of one or more (contractual) provisions, prior to the filing of the grievance" The State contends that the contractual violation alleged "must be at the time the grievance is filed." It is the State's position that "the Union cannot prove violation of any of the (contract's) provisions, because none occurred."

Pointing out that the Union's argument is that mainframe operation is bargaining unit work that supervisors shouldn't do, the State asserts that "it is undisputed that supervisors have been doing the work in question in the same amount and percentage of time since at least two years before the contract was signed, a condition expressly sanctioned in the very first sentence in 1.03, and a condition that indicates the work in question is not exclusively bargaining unit work." Further in this regard the State asserts that sentence one of Section 1.03 "is independent and stands alone of subsequent sections." This sentence is "key" asserts the State. Furthermore, asserts the State, there is nothing in the grievance with respect to "shift" assignment.

By way of elaboration, the State contends that sentences one and two of Section 1.03 furnish two distinct mechanisms for supervisors to perform bargaining unit work.

Perceiving that the Union seeks rigid adherence to the classification specification for both supervisory and bargaining unit positions, the State asserts that to the contrary, flexibility is called for, as manifested by the fact that Article 20 recognizes the classification specifications are "out of date." Further in this regard, argues the State, there is a past practice" of supervisors working on the mainframe, and this practice supersedes any administrative or Ohio Revised Code Provisions.

The State additionally contends that

". . . The Union apparently will argue that some of the employees are working outside their position descriptions or classification specifications. But this is not a group or class grievance. Mr. Angus Dunn is the only listed grievant, and the evidence will show that he was and is working well within his position description and specifications. Even as regards the other employees, if it is an issue,

the evidence will show them working within their position descriptions and specifications.

It is the Employer's position that it is well within it's management rights to make specific job assignments and to assign employees to specific machines and specific tasks. Those rights are not only traditional and well established, but incorporated into Article 5 from the very statute that gave rise to this whole process, in 4117.08, of which we will ask the arbitrator to take judicial notice. It is the Employer's position that nothing in the contract obviates those rights, or can do so, and that the arbitrator is therefore without authority to order specific job assignments.

. . . operation of the main console, or "Help Desk" is absolutely vital to several crucial information systems of State Government, and that to accept the Union's position and assign an unqualified and untrained employee to this nerve center, where a potential disaster could occur, is to work an unconscionable hardship on the Employer.

Finally, . . . the Employer has acted in good faith throughout. First, the Employer took no action in July and August of 1986, nor maintained any condition, that adversely affected the grievant's assignment. Subsequently, after the grievance was filed, it allowed the Union to adjust the grievance at Step 3; it has agreed, along with the Union to place the Computer Operator classification in the Classification Modernization Study, provided in Article 20, and it has continued to train Computer Operators in main console or Help Desk functions, even though not required to do so by the contract. In addition, the Employer can show that subsequent to the grievance being filed it added supervision to the main console area, partly at the request of the Union, only to see this grievance continue the allegations regarding supervisory work."

So it is that the State urges that the grievance be denied.

Issue:

The parties failed to stipulate to an issue. The Union proposes that the issue is:

"Is Section 1.03 of the Agreement violated by assigning computer operator supervisors to operate the main console of the computer on the first shift of the work entity in question? If so, what shall the remedy be?"

The State framed no issue as such:

In my view the issue is best put as follows:

Does the DAS's assignment of supervisors to operate the main console in the Division of Computer Services violate Article 1, Section 1.03 of the Contract, and, if so, what is the appropriate remedy?

Discussion and Opinion:

First addressed is the State's contentions with respect to the proper scope of the grievance,

namely, whether or not the grievance is properly regarded as a "class" grievance as the Union contends, and the State disputes, and whether or not the
grievance is a continuing one such that events subsequent to its filing can be taken into account in determining the contract violation alleged by the Union, or whether, as the State contends, it is not a continuing grievance, and can only be determined in light of the facts existing at the precise time that the grievance was filed. In my judgment close scrutiny of the record supports the view that the grievance has been treated
by the parties throughout as in essence both a continuing one,

and as a class grievance. Thus, as late as the third step, the Union was, without protest, allowed to allege contractual violations in addition to those initially alleged (namely, Article 1, Section 1.03 and Article 16) and indeed the State responded thereto. Moreover, from the outset it has been clear, and the State has been on notice, that the crux of the case is the meaning to be ascribed to Section 1.03, and in particular, the interrelationship between paragraph one and paragraph two. Having been on notice from the outset of the crux of the parties' dispute, urged yet again before the Arbitrator, it cannot be said that new matters have been raised at the arbitration stage which the parties had not had a chance to discuss in the pre-arbitral stages of the grievance process. But it is lack of notice, and the deprivation of discussion in the pre-arbitral stages, which is the foundation for any restrictive analysis as to the scope of a grievance. Moreover, the very nature of the subject matter of the grievance, namely the preservation of bargaining unit work and its alleged impermissible erosion, warrants the conclusion that the grievance is essentially a class grievance.

On the merits, as has been seen, at its heart the grievance is about the inter- relationship between paragraph one and two of Section 1.03 of Article 1, and more generally, involves the interpretation to be given to Section 1.03. Since the differing constructions urged by the parties are both plausible, it must be said that Section 1.03 contains a latent ambiguity. Resort, therefore, to the tenets of contract interpretation is warranted

in order to resolve this ambiguity. In this regard, a cardinal and overriding arbitral principle of contract interpretation is that a contractual provision dealing with a particular topic such as Section 1.03 dealing with the topic of "bargaining unit work," is to be interpreted as a whole. Another arbitral rule of construction holds that two clauses within a provision in seeming conflict are to be interpreted where possible in a manner which avoids such conflict, since the parties are deemed to not have intended to provide for conflicting clauses. Yet another arbitral principle holds that "to express one thing is to exclude another." Applying these principles to the facts at hand, and commencing with the principle that a provision is to be construed as a whole, it is noted that the State urged perception that paragraph one be viewed as "standing alone" is simply not persuasive. Moreover, in the clearest of terms, sentence two mandatorily restricts and confines supervisory employees ("shall only do") to the performance of bargaining unit work in certain well defined circumstances. With the absence, as here, of any definitive definition of "bargaining unit work," common sense dictates that "bargaining unit work" encompasses that work performed by

bargaining unit employees at the time the parties entered into their Agreement. There simply is no basis to infer that the parties reference was to work exclusively performed by bargaining unit employees, as the State suggests. Here the bargaining unit work in question is the operation of the mainframe computer. Reviewing the "circumstances" set forth in

paragraph two under which supervisors may perform such work, it is clear from the record no emergency is involved; no necessity to provide a break and/or lunch relief is involved; no training is involved; demonstration is involved; no avoidance of mandatory overtime is involved; no necessity to release employees for union activities is involved; and no need to provide coverage for no shows is involved. By a process of elimination,
therefore, in order to find contractual sanction under paragraph two of Section 1.03 for supervisory performance of the bargaining unit work in question here,

it must be concluded that the supervisor's "classification specification provides that the supervisor does, as part of his/her job, some of the same duties
as bargaining unit employees." Significantly, previous performance of the bargaining unit work in question by the supervisor is not listed as a permissible circumstance in
sentence two. This omission is deemed to be intentional. Thus, applying the arbitral principle of contractual interpretation known as "expressio unius est exclusio alterius," namely, "to express one thing is to exclude another," it must be concluded
that in listing several different circumstances under which supervisors would be allowed to perform bargaining unit work, the failure to list a particular circumstance (such as the
circumstance of the previous performance by a supervisor of the bargaining unit work in question) manifests an intent to exclude such a circumstance from those delineated as permissible. As has been seen, however, it is precisely the excluded circumstance

previous performance upon which the State relies. It does so on the basis of sentence one of paragraph one of Section 1.03. Concededly, this contention is a colorable one in that the language utilized is susceptible to the interpretation that implicit therein is a recognition that supervisors may perform bargaining unit work if they have previously performed such work. But since this circumstance must be deemed to have been purposefully excluded from the express permissible circumstances for the performance of bargaining unit work by supervisors outlined in paragraph two, such an interpretation of paragraph one puts paragraph one in direct conflict with paragraph two. Such a conflict must be avoided if possible. Here the conflict is readily avoided if one views paragraph one as restricting even the express circumstances outlined in paragraph two vis-a-vis the quantum of bargaining work done. Thus, while paragraph two permits supervisors to perform bargaining unit work "when the classification specification provides that the supervisor does, as part of his/her job, some of the same duties as bargaining unit employees," paragraph one serves to restrict supervisors even in this permissible circumstance "to the extent (quantum) that they previously performed such work" pursuant to and under their classification specification. The conclusion that indeed the phrase "to the extent" as found in sentence one of paragraph one of

Section 1.03 denotes the quantum of bargaining unit work is bolstered by the even clearer quantum references in sentence two ("the amount of bargaining unit work"). Finally it is noted

with respect to paragraph one that its entire tenor is restrictive of supervisors' performance of bargaining unit work, utilizing as it does the restrictive phrase "shall only perform," and mandating in sentence two, "every reasonable effort" to decrease the amount of bargaining unit work done by supervisors. Paragraph one is not "permissible," as urged by the State.

The case thus comes down to whether or not the performance of the bargaining unit work in question here is set forth as a duty in the classification specification of the supervisors performing it, such that this last remaining permissible exception to the general prescription against the performance of bargaining unit work may be said to apply and therefore sanction such. But in this regard the record is clear that the supervisory "classification specifications"[2] involved do not set forth as a duty the operation of the computer, mainframe, or otherwise.

[2]It's important to note at this juncture that "classification specification" is a term of art well recognized in State employment and that as a writing it has the distinct advantage of being tangible and in "black and white." To be remembered is the fact that the parties were negotiating on behalf of thousands of employees in several different Departments and Agencies of State government. It is readily understandable, therefore, that they would make reference to a document outside the contract and incorporate it therein, as opposed to relying on mere past practice as manifested by previous performance, which practices were doubtless both myriad and amorphous, both within any one Agency, and from one Agency to another. The classification specification is a standard of convenience and certainty. To be sure, as the State intimates, the parties had to be aware, and in Article 20 in effect recognized, that some of the Classification Specifications were outmoded. Nonetheless, in the clearest of terms they have elected to make the extant classification specification the applicable standard and yardstick, and their clearly manifested intent must be enforced.

In this manner then it must be concluded that Section 1.03 of Article 1 precludes the performance of supervisors of the bargaining unit work of operating the main console of the computer. Such work must be performed by bargaining unit employees. The issue posed is therefore answered in the affirmative. It would appear that in order to effectuate the aforesaid contractual mandate, additional bargaining unit employees must be trained and/or retrained and/or hired to meet the apparent current need for mainframe operations. In my view, whether this requires or will necessitate the retraining and/or ultimate use of Grievant Dunn for operation of the mainframe, based on his seniority or otherwise, has simply not been litigated by the parties in this proceeding. If one or another of the parties, or both, believe otherwise, the Arbitrator retains jurisdiction to rule on the matter, following receipt of a brief from the party or parties so contending (and the opposite party, should they desire to do so), based upon the record heretofore made.

Award

For the reasons more fully set forth above, the grievance is sustained to the extent that it is found that by having supervisors perform the bargaining unit work of operating the mainframe the DAS has violated Section 1.03 of Article 1 of the Contract. By way of remedy, following a reasonable transition period during which sufficient bargaining unit employees are **18**

prepared by management to operate the mainframe to meet the employer's needs, supervisors shall cease and desist from performing such work. Since the State declined to join with the Union in the latter's request that the undersigned Arbitrator retain jurisdiction in order to effectuate the Union-requested remedy, jurisdiction for that purpose is not retained. Jurisdiction is retained, however, for the limited purpose more fully noted above.

Dated: August 17, 1988

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Frank A. Keenan
Panel Arbitrator

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APPENDIX I

ARTICLE 1 - **RECOGNITION**

* * * *

§1.03 - **Bargaining Unit Work**

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.

Further, it is the intent of the Employer in the creation and study of classifications to differentiate between supervisors and persons doing bargaining, unit work. Whenever possible, such new and revised classifications will exclude supervisors from doing bargaining unit work.

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

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 ORC Section 4 117.08 (A) numbers I–9.

ARTICLE 20 - CLASSIFICATION MODERNIZATION STUDY

§20.01 - Purpose

The Employer desires to modernize the State's job evaluation system, classification specifications and qualifications, and position descriptions and to provide a more systematic approach to career development. To accomplish this, the Employer will conduct a study of the current system of classification and compensatin2 employees commensurate with duties, responsibilities, education and/or experience, required licensure or certification, and working conditions, including recognition of hazards, in a nondiscriminatory fashion The study, will commence within six (6) months of the signing, of the Agreement.

§20.02 - Labor-Management Committee

A special Labor-Management Committee on Classification Modernization will be established consisting of an equal number of Union and Employer representatives. The purpose of the committee will be to provide the necessary support in the development and implementation of the classification, study and to provide input. The committee will prioritize the classifications to be reviewed and develop ways to implement the results of the study. The Employer and the Union will jointly seek sufficient funds to implement the results of the study. Should funds not be adequate, the committee will work with the Employer to determine priority of pay grade reassignments or reclassification.

The Committee on Classification Modernization shall continue to function in an oversight capacity in the ongoing review of the classification system.

§20.3 - **Dispute Resolution**

If the Union disputes a proposed classification specification or pay range designation as determined by the study, the Union and the Employer shall meet to discuss these issues.

If the issues are not agreed upon, the Union and the Employer shall mutually agree to choose an independent third party who is knowledgeable in labor relations and classification and compensation systems to serve on this committee. The committee's decision will be binding on both parties. The expenses of file third party will be borne equally by the parties.

§20.04 - **Employee Appeals**

Upon implementation of the study, individual employee appeals will be handled through the appeals procedures in Article 19.

The Employer and the Union agree that the purpose of file classification study is to evaluate the State's existing classification plan. Therefore, the implementation of this classification study shall not result in a loss of pay nor a layoff for any employee in affected classification tittles

§20.05 - **Training, of Union**
Representatives

The Employer shall provide ongoing training for appropriate union representatives in the practices and procedures used by the Employer to determine the classification of employees and pay range of classifications. Further, all materials, documents and memoranda pertaining to the classification system shall be made available to the Union. * * *

COLLECTIVE BARGAINING

4117.08 Subjects of bargaining; exclusions

(A) All matters pertaining to wages, hours, or terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement are subject to collective bargaining between the public employer and the exclusive representative, except as otherwise specified in this section.

(B) The conduct and grading of civil service examinations, the rating of candidates, the establishment of eligible lists from the examinations, and the original appointments from the eligible lists are not appropriate subjects for collective bargaining.

(C) Unless a public employer agrees otherwise in a collective bargaining agreement, nothing in Chapter 4117. of the Revised Code impairs the right and responsibility to each public employer to:

(1) Determine matters of inherent managerial policy which include, but arc not limited to areas of discretion or policy such as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, and organizational structure;

(2) Direct, supervise, evaluate, or hire employees,

(3) Maintain and improve the efficiency and effectiveness of governmental operations,

(4) Determine the overall methods, process, means, or personnel by which governmental operations arc to be conducted;

(5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees;

(6) Determine the adequacy of the work force,

(7) Determine the overall mission of the employer as a unit of government;

(8) Effectively manage the work force;

(9) Take actions to carry out the mission of the public employer as a governmental unit.

The employer is not required to bargain on subjects reserved to the management and direction of the governmental unit except as affect wages, hours, terms and conditions of employment, and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement. A public employee or exclusive representative may raise a legitimate complaint or file a grievance based on the collective bargaining agreement. * * *

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