ARBITRATION DECISION NO.:
156

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

EMPLOYER:
Department of Mental Health,
Office of Housing and
Service Environment

DATE OF ARBITRATION:
October 17, 1988

DATE OF DECISION:
November 12, 1988

GRIEVANT:
Ron Rhonomus

OCB GRIEVANCE NO.:
G-86-1107

ARBITRATOR:
Harry Graham

FOR THE UNION:
John Porter

FOR THE EMPLOYER:
Tim Wagner

KEY WORDS:
Supervisor Performing
Bargaining Unit Work

ARTICLES:
Article 1 - Recognition
§1.03-Bargaining
Unit Work

FACTS:
During November 1986, the Office of Housing and Service Environment of the Department of Mental Health was under the direction of Ms. L. Ms. L. was concerned over the operations of the Office, particularly in the area of residential licensing. Mr. F., an employee of the Department, was classified as a Mental Health Administrator 3, (MHA-3). As such, he examined the work product of

the surveyors who examined facilities applying for Ohio licensure, but was not responsible for the supervision of people. As part of his duties, he certified residential facilities as being eligible for State license.

The MHA-3 position was part of the bargaining unit. In November 1986, Mr. F. was given a leave of absence that lasted until October 1987. The vacant position was posted and filled by Ms. S. on a temporary vacancy for ten weeks.

At the end of that period, Ms. S. received a position as a Health Facilities Standards Supervisor, (HFSS). This position had been vacant and had been posted by the State. The HFSS classification was not within the bargaining unit represented by the Union. The Union viewed the position as being within the bargaining unit and that the tasks being performed by Ms. S. as HFSS, had formerly been performed by Mr. F as a MHA-3. The issue presented by the Arbitrator is: Did the Employer violate the Collective Bargaining Agreement when it assigned duties once performed by Mr. F. to Ms. S.? If so, what is the appropriate remedy?

EMPLOYER'S POSITION:

The HFSS position was not newly created. It was simply an unfilled position. Mr. F. could return to the Department as a MHA-3 as that position has not been abolished. The duties of the HFSS and the MHA-3 positions overlap but not to a great extent. The basic difference between the two positions lies in the area of employee supervision.

The MHA-3 position does not entail supervising any employees. The HFSS does have supervisory authority inherent in it and is thus a non-bargaining unit position.

The State requests an award denying the grievance in it entirety. The bargaining unit has not been eroded, and the MHA-3 position remains on the table of organization. At the hearing the Union requested the arbitrator direct management to fill the vacant position. This is an improper amendment to the original grievance and should be denied.

UNION'S POSITION:

The MHA-3 position is included in the bargaining unit. The tasks assigned to the HFSS are substantially the same as those performed by the MHA-3.

Article 1, Section 1.03 provides that the State shall make every effort to decrease the amount of bargaining unit work done by supervisors, and that supervisors shall do bargaining unit work only to the extent previously performed. The State violated the Agreement by excluding the HFSS from the bargaining unit. The Union seeks to have the grievance sustained and to have an award granted directing the State to utilize the services of a member of the bargaining unit to perform those tasks formerly done by Mr. F.

ARBITRATOR'S OPINION:

Arbitrators will generally construe work preservation clauses strictly in order to protect job security. Under Article 1, the circumstances under which supervisors may perform bargaining unit work are carefully spelled out. One condition, that the work must have previously been performed by a supervisor, is not met in this case.

The Agreement took effect July 1, 1988, and on that date the HFSS position was vacant. By prior arbitrators decision, in a dispute which alleges that supervisors are performing bargaining unit work, the proper time to examine when a supervisor was properly performing bargaining unit work is the date the Agreement took effect. It is clear that the amount of bargaining unit work performed has increased. This violates the agreement.

AWARD:

The grievance is sustained. The duties formerly performed by a member of the bargaining unit are to be restored to the bargaining unit. The supervisory duties set forth in the position description may continue to be performed by non-bargaining unit personnel.

The Union request that a bargaining unit employee be assigned to the MHA-3 position is misplaced. Only the employer has the power to fill the position or not to fill the position.

TEXT OF THE OPINION:

In the Matter of Arbitration

Between

Ohio Civil Service Employees Association/AFSCME Local 11

and

The State of Ohio, Department of Mental Health

Case No.:
G-86-1107

Appearances:

For OCSEA/AFSCME Local 11:
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Introduction:

Pursuant to the procedures of the parties a hearing was held in this matter on October 17, 1988 before Harry Graham of South Russell, OH. At that hearing both parties were provided complete opportunity to present testimony and evidence. A post-hearing statement was filed by the parties. It was exchanged by the Arbitrator on October 26, 1988 and the record was declared to be closed on that date.

Issue:

At the hearing the parties were in general agreement concerning the issue that gives rise to this proceeding. Each presented a slightly different formulation of the issue to the Arbitrator and left it for the neutral to determine its precise formulation. The Arbitrator finds the issue to be:

Did the Employer violate the Collective Bargaining Agreement when it assigned duties once performed by John Favret to Joan Salmons? If so, what shall the remedy be?

Facts:

The parties have no disagreement over the facts that generated this controversy. During November, 1986 the Office of Housing and Service Environment of the Department of Mental Health was under the direction of Grace Lewis. Ms. Lewis was concerned over certain aspects of the operations of the Office, particularly in the area of residential licensure. People who were contract employees of the State, that is, not on the regular payroll of the State, were employed as surveyors to examine facilities applying for license in Ohio. Some 22-30 people in the office were functioning as surveyors but were not on the regular payroll. Four people were employed by the State as surveyor's.

Among employees of the Department was John Favret. He was classified as a Mental Health Administrator 3, Position Control No. 12013. As such, he was involved with examining the work product of surveyors. He was not responsible for supervision of people. As part of his duties he certified residential facilities as being eligible for State license.

In November, 1986 Favret sought and received a leave of absence. This leave lasted to October 10, 1987. The vacant position was filled by posting. Ultimately, Joan Salmons received the position on a temporary vacancy for ten weeks. At the end of that period the State posted for a vacant position of Health Facilities Standards Supervisor (HFSS). Salmons received that position. It was determined by the State that the HFSS classification was not within the bargaining unit represented by the Union. In the opinion of the Union the duties performed by the occupant of the HFSS position were properly to be considered as being within the bargaining unit. In particular, it was the Union's view that the tasks being performed by Ms. Salmons were once performed by John Favret, formerly a member of the bargaining unit when classified as a Mental Health Administrator 3.

To protest what it regarded as a violation of the Agreement the Union filed the instant grievance. It was not resolved within the procedure of the parties and was properly advanced to arbitration. The parties agree that the grievance is before the Arbitrator for determination on its merits.

Position of the Union:

In SERB Case No. 85-RC-04-3483 the Ohio State Employment Relations Board (SERB) considered the question of whether or not the position of Mental Health Administrator 3 should be included within the bargaining unit. Among the positions considered in that proceeding was the one held by John Favret, Position Control Number 12013. The Employment Relations Board determined that Favret's position should properly be considered to be within the bargaining unit.

The bulk of the duties performed by the Mental Health Supervisor 3, PCN 12013 (also known as Manager, Residential Licensure) are concerned with administration of aftercare licensure. In

connection with this task the incumbent would review license applications and renewals. He would direct licensure surveys and conduct validation surveys. Those surveys are in the nature of a check on the work of surveyors to determine if their findings are accurate. According to the position description of the State those tasks account for 30% of the duties associated with the position. Another 10% is accounted for by developing for the Department of Mental Health licensure policies and procedures. The remaining 60% of the duties for PCN 12013 is concerned with mediating conflict over licensure, coordinating, planing and developing goals and objectives, investigating requests for waivers and unusual incidents, developing effective communications and training programs, collecting and analyzing statistical data, representing the Department in interdepartmental meetings as appropriate and providing assistance to aftercare facilities upon request. Each of these functions accounts for 5% of the duties of the position.

Examination of the tasks assigned to the Health Facilities Standards Supervisor shows them to be largely similar to those performed by the Mental Health Administrator 3, PCN 12013 in the union's view. Thus, the HFSS reviews and recommends for license issuance upon survey results, advises surveyors on procedures, and checks on unusual incident reports (43%), survey's and evaluates facilities for compliance with State standards (15%), develops and implements forms and policies (22%), serves as liaison with other State departments and prepares evidence for revocation hearings (10% each). The tasks performed by each position are substantially the same. At Article 1, Section 1.03 the Agreement provides that supervisors shall do bargaining unit work only to the extent previously performed. The Agreement specifies that the State shall make every effort to decrease the amount of bargaining unit work done by supervisors. Article 1, Section 1.03 continues to specify the circumstances under which supervisors may perform bargaining unit work. These are:

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 part of his/her job, some of the same duties as bargaining unit employees.

These circumstances are absent in this situation according to the Union. Consequently, State violated the Agreement by excluding the HFSS position from the bargaining unit in its view.

In Grievance No. G-86-0335 Arbitrator Frank Keenan decided a case involving these parties in which the issue was also concerned with performance of bargaining unit work by supervisory employees. In the dispute before Arbitrator Keenan he held for the Union and found the Employer in violation of Article 1, Section 1.03 of the Agreement. This Grievance involves duties being performed by a supervisory position that was not filled at the time the Agreement came into effect, July 1, 1986. That fact makes it in accord with Arbitrator Keenan's decision as he held that the relevant time frame governing situations such as this one is the date the parties entered into their Agreement. As no supervisor was performing the duties associated with the HFSS on July 1, 1988 it cannot be said that a supervisor was engaged in duties contained in a supervisor's classification description. The supervisors cannot be said to have been performing work they previously had performed. As a result, given the correspondence between the tasks performed by Favret and Salmons and the prohibition against supervisors performing bargaining unit work, the Union urges that this grievance be sustained. It seeks an award directing the State to utilize the services of a member of the bargaining unit to perform those tasks formerly done by John Favret.

<u>Position of the Employer</u>:

The State points to the record of events involved in this case. When John Favret went on leave the Department did not newly create the position of Health Facilities Standards Supervisor. That position was already in existence, though unfilled. Grace Lewis decided to fill the position in order to improve operations of the Office of Housing and Service Environment. Subsequent to Favret's going on leave he decided not to return to the Department. The Department has not abolished his position. It continues in existence. Should Favret return he could resume his duties as a Mental Health Administrator 3 in the Department, in his old position.

The duties of the Mental Health Administrator 3, Favret's position, and the Health Facilities Standards Supervisor have some overlap. Such overlap is not great. Thus, the bulk of Favret's time was taken up with survey work according to the State. (50-55%). Salmons does surveys only in cases of emergency, such as when an employee is ill.

Favret could recommend approval or disapproval of license applications. He did not have authority to approve or disapprove such actions. That authority resided with higher levels of management, such as the HFSS. Favret did not supervise any employees. He evaluated the work product of surveyors, many of whom are contract employees of the State. That is, he did not make any personnel decisions. The person classified as HFSS does make such decisions such as approving leave, evaluating employees and developing work schedules.

The fact situation facing Arbitrator Keenan was different from that posed in this dispute. In the case before him all work being performed was done by supervisors. In this case, there are overlapping duties. The employees involved in Arbitrator Keenan's case had no supervisory responsibilities. Ms. Salmons, the HFSS has such duties. This different fact situation should prompt a different outcome from that reached by Arbitrator Keenan according to the State.

Attention must be devoted to the position descriptions of the Mental Health Administrator 3 and the HFSS. Those descriptions indicate clearly that the proportions of time to be devoted to various tasks are substantially different. In essence, the Mental Health Administrator 3 is analogous to a lead man position. On the other hand, the HFSS may truly be considered to be a non-bargaining unit position due to the supervisory authority inherent in it.

In this case, the bargaining unit has not been eroded. The Mental Health Administrator 3, PCN 12013, remains on the table of organization, albeit vacant at this time. The duties of the HFSS are sufficiently different as to call for an award in favor of the State it insists.

Pointing to the Grievance, the State notes that the remedy requested when it was filed was that Mental Health Administrator 3 duties remain in the bargaining unit. In fact, remain there, though unperformed at this time. At the hearing the Union sought an award directing that the position be filled. Such an amendment of the original grievance is improper and should not be permitted according to the State. It seeks an award denying the grievance in its entirety.

Discussion:

In general, arbitrators have construed work preservation clauses strictly. This view of such contract language is of long duration. Thus, in 1947 the eminent Saul Wallen observed in New Britain Machine Co.:

Job security is an inherent element of the labor contract, a part of its very being. If wages is the heart of the labor agreement, job security may be considered to be its soul. Those eligible to share in the degree of job security the contract affords are those to whom the contract applies.

The transfer of work customarily performed by employees in the bargaining unit to others outside the unit must therefore be regarded as an attack on the job security of the employees whom the

agreement covers and therefore on one of the contract's basic purposes. 8 LA 722.

Arbitrators have routinely followed that view since that time, viewing work preservation clauses with the utmost seriousness. See: Holland Plastics, Inc. 74 LA 69 (Belcher, 1980), South Western Publishing Co. 62 LA 562 (High, 1974), Stauffer Chemical Co. 44 LA 188 (Seinsheimer, 1965), Ideal Cement Co. 52 LA 49 (Williams, 1969).

In this situation, the parties carefully negotiated the circumstances under which supervisors may perform bargaining unit work. Enumerated above, they include the standard restrictions upon the ability of an Employer to substitute non-bargaining unit employees for bargaining unit members. In addition to emergencies, break or lunch relief, instruction, training, avoidance of mandatory overtime, release of employees for union or other approved activities or to provide coverage for no-shows, the Employer is permitted to use supervisors when "the classification specification provides that the supervisor does, as part of his/her job, some of the same duties as bargaining unit employees."

That language should be read in conjunction with language found elsewhere in Article 1, Section 1.03. The first sentence of the Section provides that "Supervisors shall only perform bargaining unit work to the extent that they have previously performed such work." In this situation, no supervisor performed much of the work presently being done by the HFSS. To the contrary, the HFSS position was unfilled and many of its duties were performed by John Favret, a Mental Health Administrator 3 which is a bargaining unit position. Union witness Rhonomous testified without contradiction that the HFSS position had been filled once. It was last occupied prior to Salmons' assumption of its duties by Jean Sherman who vacated it in 1982. In Rhonomous' opinion, Sherman did not perform the same duties as Favret while in the position. There was no incumbent in the HFSS position for four (4) years prior to Salmons filling it. Consequently, it must be concluded that the first condition necessary to permit the State to act as it did in this instance has not been satisfied. That is, there was no supervisor who previously performed the work as required by Article 1, Section 1.03.

In Case No. G86-0335 Arbitrator Frank Keenan was confronted with a dispute which involved Supervisors allegedly performing bargaining unit work. Arbitrator Keenan determined that the proper time to examine when a supervisor was properly performing work bargaining unit work was the date the Agreement took effect, July 1, 1986. On that date, the HFSS position was vacant. When the HFSS position was filled by Ms. Salmons it is indisputable that many of the tasks she performed had also been performed by Mr. Favret. 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, Section 1.03 which provides that the amount of bargaining unit work performed by supervisors shall not increase during the life of the Agreement. The Agreement continues to specify that the State will make "every reasonable effort to decrease the amount of bargaining unit work done by supervisors." The opposite occurred in this instance. The amount of bargaining unit work performed by members of the bargaining unit was decreased, while the amount of such work performed by supervisors was increased. This is explicitly prohibited by the agreement.

The parties negotiated the language in Article 1, Section 1.03 in order to preserve to members of the bargaining unit the amount of work they have historically performed. If the position of the State is adopted in this dispute that mutual objective of the parties will not be met. That is, a non-bargaining unit person will be performing tasks once done by a member of the bargaining unit. This is not what was contemplated by the parties in the Agreement. To the extent a supervisor was not performing the tasks done by John Favret on July 1, 1986 and is performing those tasks today, the Agreement has been violated by the Employer.

Examination of the position description for the HFSS classification indicates it has associated

with it supervisory duties. The person in that classification supervises 2 Social Service Licensing Specialists and 1 Social Program Developer. Those duties are not part of the Mental Health Administrator 3, PCN 12013 position. The supervisory duties performed by the HFSS position do not represent a violation of the Agreement. The overlapping tasks performed by the HFSS and the Mental Health Administrator 3 indicate that to the extent such tasks overlap, a violation of the Agreement has occurred. Based upon the testimony of Union witnesses Jones and Wood, such overlap is substantial. It is prohibited by the Agreement under these circumstances.

Award:

Based upon the preceding discussion the grievance is SUSTAINED. The duties formerly performed by a member of the bargaining unit, John Favret, are to be restored to the bargaining unit. The supervisory duties set forth on the Position Description, Joint Exhibit 5, may continue to be performed by non-bargaining unit personnel.

The Union request that a bargaining unit employee be assigned to John Favret's Mental Health Administrator 3 position is misplaced. The determination to fill or not to fill that position is within the purview of the Employer.

Signed and dated this 12th day of November, 1988 at South Russell, OH.

Harry Graham
Arbitrator