ARBITRATION DECISION NO.:
574

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

EMPLOYER:
Department of Rehabilitation Correction,
Madison Correctional Institution

DATE OF ARBITRATION:
November 4, 1994 and
December 13, 1994

DATE OF DECISION:
April 28, 1995

GRIEVANT:
Mark Crosbie

OCB GRIEVANCE NO.:
27-15-(93-12-29)-0309-01-03

ARBITRATOR:
Charles F. Ipavec

FOR THE UNION:
Patrick Mayer

FOR THE EMPLOYER:
Roger A. Coe, Advocate
Lorn Kitchen

KEY WORDS:
Goldstein Decision
Pick-A-Post
Good Management Reason to Deny Bid
Seniority
Work Assignment, Institution

ARTICLES:
Article 2 - Non-Discrimination
    §2.02 - Agreement Rights
Article 24 - Discipline
    §24.06 - Prior Disciplinary Actions

FACTS:
In December, 1993, there was a vacancy in the position of Special Duty Transportation Officer at the Madison Correctional Institute. Since this vacancy was a bid position, the grievant applied for the assignment. The position was awarded to an employee who had less seniority than the grievant.

The job position of a Special Duty Transportation Officer is a position that is available for bid whenever a vacancy occurs. This position is subject to the Pick-A-Post procedure.

UNION'S POSITION:

Management violated Article 2.02 of the Agreement when the grievant's bid for a pick-a-post assignment was denied. The grievant was the most senior, qualified officer bidding on the assignment. The position was given to a person who was less senior than the grievant.

EMPLOYER'S POSITION:

Management's decision not to grant the grievant's bid was based on the terms of the pick-a-post agreement. In every pick-a-post agreement, management reserved the right to deny an employee's bid for good management reasons. Based on the grievant's attendance, discipline, and/or performance history, management had a good reason to deny his bid.

ARBITRATOR'S OPINION:

Seniority is an extremely important right because the right of seniority can have a significant effect on not only the length of employment of a bargaining unit employee, but also on the proper job assignments of such employees.

In negotiating the Pick-A-Post Agreement, the Agency also negotiated the inclusion of an exception to the general grant of a seniority right to an award of a bid, that management reserves the right to not make an assignment for good management reasons. Because of the inclusion within the collective bargaining agreement of Section 2.02 - Agreement a Rights - there is negotiated provision which guarantees to the members of the bargaining unit that the Agency will not be permitted to make arbitrary decisions. The reasons cited by management for denying the grievant the bid were not sufficient to exclude the grievant from the position.

A performance evaluation that meets expectations should not preclude an employee from being awarded a bid job unless the collective bargaining agreement specifically provides that the employee with the best performance review will be awarded the job.

Ordinary run of the mill discipline which is removed from the employee's personnel file after two years of no intervening discipline, in the opinion of the arbitrator, cannot form the basis for a "good management reason" to deny the grievant the bid for a special duty post.

Finally, any attendance deficiency which an employer deems to be sufficiently serious so as to exclude the employee from a bid job must be attendance that has subjected the employee to discipline. All absences which are permitted by law, by the policy of the Agency, or by approval of supervision cannot be deemed to be a deficiency of sufficient proportion to exclude the grievant for the bid post.

The foregoing may be deficiencies but they are not exclusionary factors in order to allow management to circumvent a seniority right of an employee, and in the present case, the grievant.

When an employee engages in conduct which has not risen in severity to give the Agency just cause for discipline, such misconduct may be deemed a deficiency by the Agency which must be corrected within the 30 day orientation period, as provided for in the Pick-a-Post Agreement.

AWARD:

The grievance was sustained.

TEXT OF THE OPINION:

UNITED STATES OF AMERICA

VOLUNTARY LABOR ARBITRATION

CHARLES F. IPAVEC
Arbitrator

In the Matter of the Arbitration between:

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

-and-

STATE OF OHIO,
DEPARTMENT OF REHABILITATION
CORRECTION,
MADISON CORRECTIONAL INSTITUTION

OPINION AND AWARD
Grievance
No. 27-15-(12-29-93)-309-01-03
As Filed by Mark Crosbie

The oral hearings in this case required two days. The first hearing was held on November 4, 1994 in a conference room of the Office of Collective Bargaining of the Ohio Department of Administrative services, Columbus, Ohio. The second day of hearing was held on December 13, 1994 in a conference room of the Madison Correctional Institution, London, Ohio. Both hearings were presided over by Charles F. Ipavec, the arbitrator, to whom the parties assigned the within dispute.

Patrick Mayer, OCSEA Field Representative, presented the case on behalf of the Union and the Grievant. Also present were Linda Fiely, OCSEA General Counsel; Frank Penwell, Chapter President; and Mark Crosbie, the Grievant.

Roger A. Coe, Management Advocate, presented the case on behalf of the Agency and he was assisted by Lorn Kitchen from the office of Collective Bargaining. Also present were Joseph B. Shaver, Chief Labor Relations; Nicholas G. Menedis, Executive Assistant to the Executive Director of the OCB; Georgia Brokaw, Assistant Chief Arbitration Services OCB; Philip A. Lomax, Labor Relations Officer; and Lana Slepter Stanley, Major, MACI.

There were no objections to arbitrability on procedural grounds or on substantive grounds; accordingly then, this matter is properly before the arbitrator, on the merits, for a final and binding decision pursuant to the contract between the parties. Both parties timely filed post hearing briefs. There was no stenographic record made of the proceedings at either of the hearing days, so that the documents presented into evidence, the post hearing briefs submitted by the parties, and this opinion and award then constitute the entire record for this case. Subsequent to the filing of the post hearing briefs, the arbitrator was requested to not proceed to the preparation of a written award pending the attempts by the parties to settle the within dispute. The parties were not successful in reaching a settlement and the arbitrator was then instructed to proceed to the preparation of a written opinion and award.

GRIEVANCE

On December 27, 1993, the grievant, Mark Crosbie, who held the classification of Correction Officer, filed a grievance which was identified as number 27-15(12-29-93)309-01-03 in which the statement of facts upon which the grievance was based was stated as follows:

"On 12-23-93 C.O. Crosbie was advised that he was not awarded the transportation position for which he was the second most senior qualified officer that signed for this position. The position was awarded to an

officer with less seniority."

The remedy sought was:

"If a more senior employee is not awarded the position, then for officer Crosbie to be awarded the transportation position for the Pick-A-Post Agreement to be followed and for the Union to be made whole.

At the third step of the grievance procedure, Idris Abdurraqib, Labor Relations Officer, serving in the position of the Hearing Officer for the within grievance, issued, in pertinent part, the following decision:

"Union's Contention: The Union contends that on December 23, 1993, grievant was advised that he was not awarded the transportation position for which he bid and was most senior, qualified officer bidding on this assignment. The Union contends that a less senior officer got the position.

Union's Remedy: MaCI management is to award the transportation position to the most senior officer who bid. MaCI management is to also abide by the terms of the MaCI Pick-A-Post (PAP) agreement.

Discussion: Madison Correctional Institution (MaCI) management contends that their decision not to grant grievant's bid was based upon the terms of the PAP Agreement. MaCI management considered not only the seniority of those employees bidding, but also considered attendance history, disciplinary record and performance (evaluations).

The successful bidder for the transportation position was John Martindale, who was the fourth (4th) senior officer on the bid list. The grievant and two (2) other officers (who both filed grievances concerning this issue) were more senior to Martindale. A review and comparison of the attendance, disciplinary and performance history of these four (4) bidders indicates that Martindale's record in the aforestated three areas was appreciably superior to grievant's record, especially in the areas of attendance and discipline.
Decision: The grievance is denied at Step 3. MaCI has not violated the contract as alleged by the Union. In fact, Martindale, the successful bidder, has been an active OCSEA union officer at MaCI and, if Article 2.02 was the (alleged) basis of MaCI section process, then, it seems, Martindale should not have been selected for the transpiration position."

The office of collective bargaining concurred with the hearing officer and at the step four (4) grievance review, informed the grievant as follows:

"The Office-of Collective Bargaining has reviewed the above-cited grievance. You allege that management violated Section 2.02 of the collective bargaining agreement when your bid for pick-a-post assignment was denied.

In every pick-a-post agreement, management reserved the right to deny an employee's bid for good management reasons.

Based on your attendance, discipline, and/or performance history, management had a good reason to deny your bid.

Your grievance is denied."

The Union then timely appealed the within grievance to arbitration which is Step Five of the grievance procedure as set forth in Article 24, of the Contract between the parties.

ISSUE

The parties did not stipulate an issue for the arbitrator to decide; and, each party proposed their own version of an issue.

The proposed issue suggested by the Union is as follows:

"Was the reason management denied the grievant a pick-a-post position proper under the collective bargaining agreement, the local pick-a-post agreement and the Goldstein arbitration award?"

The proposed issue suggested by the Agency was as follows:

"Did the employer reasonably exercise its management right when it denied the special duty transportation post to the grievant?"

DECISION

In December 1993, there was a vacancy in the position of Special Duty Transportation Officer at the Madison Correctional Institution, and since such vacancy was a bid position, the grievant, Mark Crosbie, applied for the assignment. The Madison Correctional Institution awarded such bid position to Correction Officer John Martindale. After such appointment, three employees who were senior to Mr. Martindale, the successful applicant, filed grievances alleging that their contractual rights were violated because they did not receive such a position. Of the three Correction Officers who filed grievances, the most senior was Timothy Follrod, who subsequently withdrew his grievance. The grievant was next in seniority, and the Correction Officer whose seniority fell between the grievant and the successful applicant, Russell Castle, also withdrew his grievance. The foregoing withdrawals of grievances resulted in the grievant being the only Correction Officer who bid on the vacancy who continued to be interested to bid on such assignment and who was senior to the successful applicant. The parties cited Section 2.02 - Agreement Rights, of Article 2 of the contract between the parties, as being applicable in this case. Such Section 2.02 provides as follows:

*** * ***

“No employee shall be discriminated against, intimidated, restrained, harassed or coerced in the exercise of rights granted by this Agreement, nor shall reassignments be made for these purposes.”

*** * ***

The job position involved in this case is Special Duty - Transportation Officer which is a position that is available for bid whenever a vacancy occurs. The parties have characterized such a procedure as Pick-A-Post and, presented to the arbitrator the history of the negotiations between the parties which resulted in a Pick-A-Post Agreement, which included an award and a supplemental award by Arbitrator Goldstein in order to establish the parameters of the Pick-A-Post concept as utilized by the parties at the Madison Correctional Institution.

The Pick-A-Post Agreement between the parties encompasses a number of documents in order to arrive at an interpretation of the entire parameters of such negotiated agreement; however, in this case, there are only two concepts which are deemed, by the arbitrator, to be applicable; and such two concepts are as follows:

“Management maintains the right to deny a bid to a Special Duty non-rotating post for good management reasons.

and

Special Duty: Special Duty posts will be a minimum one (1) year non-rotating post and shall be bid on a seniority basis and will require a 30 day orientation.”

Concerning the requirement of the 30 day orientation period, the parties have also agreed as follows:

"Management reserves the right to establish a 30 day orientation period for certain special duties and non rotating posts in order to evaluate performance, provide training and correct deficiencies."

The current status of the employment at will concept within the State of Ohio, as enunciated by the Supreme Court of the State is that the right of an employer to discharge an employee at will is not limited by principals which protect persons from gross or reckless disregard of their rights and interests; willful, wanton, or malicious acts; or acts done intentionally with insult or in bad faith. It follows then, in the opinion of the arbitrator, that if an employer has the right to discharge an employee for any lawful reason, for a bad reason, or even no reason, then the Employer would also have the right to deny to that employee a job assignment which the employee desired to have, irrespective of seniority. The arbitrator is aware that there are a number of exceptions of the exercise of the basic Doctrine of Employment at Will as enunciated by the Supreme Court of the State of Ohio as set forth herein, such as the implied contract exception, the promissory estoppel exception, and the public policy exception, just to name a few.

In this case, it is not necessary that we be concerned with the Ohio Employment at Will Doctrine because the grievant is a member of a bargaining unit and such bargaining unit has an existing contract between the Union and the Employer, the State of Ohio, and such contract adopts the guiding principal that both parties are committed to a promotion of harmonious relations and to establish an equitable and peaceful procedure for the resolution of differences; and the establishment of wages; and other terms and conditions of employment; and, as such, constitutes yet another exception to the Employment at Will Doctrine. Under the statement "terms and conditions of employment" employee rights may be negotiated which can have a direct impact on the inherent right of the Employer to manage their employees.

Perhaps the most important employee right, which a Union may negotiate for the members of a bargaining unit, is that of seniority. Seniority is an extremely important right because the right of seniority can have a significant effect on not only the length of employment of a bargaining unit employee, but also on the proper job assignments of such employees.

The Special Duty - Transportation Officer post is one that is to be bid on the basis of seniority pursuant to the Pick-A-Post Agreement so that if we look at only such provision of the Pick-A-Post Agreement, it must be concluded that since the grievant is senior to the successful applicant, that the Agency erred and should have given the assignment to the grievant rather than to the successful applicant who is junior in seniority to the grievant.

The requirement, in the Pick-A-Post Agreement, that the bids will be on a seniority basis is a grant of an employee right that is deleted from the inherent management right of the Agency; however, we must look at the entire agreement to see whether or not such a grant of seniority right is without exception or with an exception. In negotiating the Pick-A-Post Agreement the Agency also negotiated the inclusion of an exception to the general grant of a seniority right to an award of a bid, that management reserves the right to not make an assignment, such as that which is desired by the grievant, for good management reasons. This brings us to the impasse concerning the within grievance in that the grievant states that he is senior and is entitled to the bid position assignment and the Agency says that they had good management reasons not to grant such an assignment to the grievant.

Perhaps, under the Ohio Employment at Will Doctrine, the action of the Agency to deny to the grievant the bid position, would be permitted; however, here we have perhaps the major exception to the At Will Employment Doctrine, which is a Collective Bargaining Agreement. We must now review this matter under the principles which have evolved in the employment history of the United States under collective bargaining agreements. when we review the shift of the rights of management to the rights of an employee, in this case we first note that management negotiated away the right to use their sole discretion in the bidding procedure for a special duty post, in that such bid would be considered on a seniority basis, but then the Agency further negotiated a string on such seniority right in that they could deny a requested assignment for good management reasons and further the Agency negotiated a second string to the seniority right by providing that even after a bargaining unit employee is awarded the bid special duty post that the individual is subject

to a 30 day orientation period in order to evaluate performance, provide training and correct deficiencies.

Once a bargaining unit is established and a collective bargaining unit is negotiated it is almost automatic, in the opinion of the arbitrator, that the management is restricted in the arbitrary exercise of the power of management and from that point forward management cannot say that they are not restrained or not limited in the exercise of management's power. In this case, because of the inclusion within the collective bargaining agreement of Section 2.02 - Agreement Rights - we have a negotiated provision which guarantees to the-members of the bargaining unit that the Agency will not be permitted to make arbitrary decisions.

What this means is that whenever management cites as a good management reason for denying to an employee their otherwise granted seniority right under the contract between the parties, that such action is subject to review in order to determine the validity of a good management reason, and whether or not the Agency acted in a proper manner or in an arbitrary manner.

The findings of the Step Three Hearing Officer was that the Agency not only considered seniority in determining which employee would be awarded the bid position but also considered attendance history, disciplinary record and performance The Agency cautioned the arbitrator to not substitute his judgment for that of the judgment of management. The arbitrator has no intention of making such a substitution because the Agency has the right to deny a bid for good management reasons and the arbitrator will only review the reasons given by management to determine whether such reasons are valid or not.

In addition to the reasons referred to in the findings of the Step Three Hearing Officer, Major Stanley testified at the hearing that there was another reason which she characterized as problematic behavior with inmates.

Such fourth reason of problematic behavior with inmates was added somewhat after the time that the grievance was filed and in such instances, in the opinion of the arbitrator, such additional reason should not be given merit by the arbitrator in that it was not stated as one of the reasons which initially constituted the total concept of "good management reasons". In addition, such fourth reason was not buttressed by a showing that the grievant had been disciplined for any problematic behavior with inmates which would then lead the arbitrator to believe that the problematic behavior with inmates was not in reality a large problem which would justify discipline; and therefore, not have an exclusionary effect on a bid for a special duty post.

The Agency cited the work performance of the grievant as a reason for the rejection of his bid for the special duty assignment. Upon a review of the performance evaluations made for the six years preceding the time that the grievant requested the special duty assignment reveals that in each of such evaluations, the grievant was rated as meets expectations. When an employee is rated as having met expectations, that means that whatever it was that the employer required in the various categories of the performance review that such employee had performed properly and a meets expectation rating should not, in the opinion of the arbitrator, preclude an employee from being awarded a bid job unless the collective bargaining agreement specifically provides that the employee with the best performance review will be awarded the job. The contract between the parties does not contain any provision which could be construed to allow a performance review showing an employee to have "met expectations" in all categories in a period of six years to thereby be excluded from a seniority right.

The Agency cited the disciplinary record of the grievant as another reason upon which the Agency based its decision to not award the grievant a special duty post. The evidence presented at the hearing showed that the grievant did not have an active discipline although he had previously been disciplined and Section 24.06 - Prior Disciplinary Actions - provides as follows:

“All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an employee's personnel file twelve months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months.

Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline imposed during the past twenty-four (24) months.

The retention period may be extended by a period equal to employee leaves of fourteen (14) consecutive days or longer, except for approved periods of vacation leave."

The grievant had been disciplined in the past for attempting to run down a fellow employee with a vehicle and although such an action is deemed quite serious, in most instances, in the case of the grievant it was not considered as being serious enough to give the Agency just cause to discharge the grievant and therefore such discipline was relegated to the ordinary run of the mill discipline which is to run off after two years; accordingly then, in the opinion of the arbitrator, such discipline cannot form the basis for a "good management reason" to deny the grievant the bid to special duty post.

The Agency listed the attendance history of the grievant as another reason for not awarding him a special duty post. It is noteworthy, in the opinion of the arbitrator, that the grievant had never been disciplined for any attendance problem or for any misuse of sick leave. The evidence showed that the grievant had been absent on many occasions, and because the Agency wishes for the Corrections Officer who was assigned to the Special Duty Transportation Officer post to have a good attendance record, the attendance record of the grievant must be reviewed to determine whether or not such record was considered of a serious enough nature to exclude the grievant from the bid post. In the opinion of the arbitrator, any attendance deficiency which an employer deems to be sufficiently serious so as to exclude the employee from a bid job must be attendance that has subjected the employee to discipline for such attendance deficiencies. All absences which are permitted by law, by the policy of the Agency, or by approval of supervision cannot be deemed to be a deficiency of sufficient proportion to exclude the grievant for the bid post. There was no evidence presented which could lead the arbitrator to conclude that the Agency considered the absences of the grievant as being improper and discipline the grievant for such absences.

The action for which the grievant was disciplined, an attempt to run down a fellow employee, is a deficiency in the conduct of the grievant, and hopefully, such conduct has been corrected and not further engaged in as a result of the corrective discipline which the grievant received. The attendance of the grievant for those days that are not properly permissible as stated herein, may constitute a deficiency for the grievant which has not risen to the point of requiring discipline in the management opinion of the Agency. The problematic behavior with inmates, on the part of the grievant, may be a deficiency which also has not risen to the level of requiring discipline in the management opinion of the Agency. The foregoing may be deficiencies but they are not exclusionary factors in order to allow management to circumvent a seniority right of an employee, and in this case, the grievant.

The Pick-A-Post Agreement provides for newly assigned special duty posts that management will have a 30 day period in which to evaluate performance, provide training and correct deficiencies. The aforementioned provision of the Pick-A-Post Agreement contemplates, in the opinion of the arbitrator, that employees who are awarded, properly in all other respects, a special duty post may have deficiencies but not be possessed of exclusionary factors. Obviously, the Agency did not form the opinion that the grievant was the best employee for the special duty post; however, the arbitrator finds that the three reasons given by management under the right of management to deny a bid for "good management reasons" did not rise to the level envisioned by the Pick-A-Post Agreement. As pointed out, the grievant may have deficiencies which do not exclude him from the right to be awarded to the bid of special duty post and the grievant should have the opportunity to correct the deficiencies, which the Agency is of the opinion that disqualifies the grievant from being awarded the special duty post.

This decision does not constitute, in the opinion of the arbitrator, a substitution of the judgment of the arbitrator for the judgment of the management of the Agency because the arbitrator has found that the reasons given by the Agency as constituting "good management reasons" are non existent as an exclusionary factor in that there was no discipline applied for any of the conduct which formed the basis for the exclusionary reasons given by the Agency to deny to the grievant the bid to the special duty post. As pointed out, when an employee engages in conduct which has not risen in severity to give the Agency just cause for discipline, such misconduct may be deemed a deficiency by the Agency which must be corrected within the 30 day orientation period, all as provided for in the Pick-A-Post Agreement.

AWARD

Grievance No. 27-15-(12-29-93)-309-01-03 as filed by the grievant, Mark Crosbie, is sustained.

Charles F. Ipavec
Arbitrator

Dated and made effective April 28, 1995 and made effective at the facilities of the Madison Correctional Institution in London, Madison County, Ohio.