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VOLUNTARY LABOR ARBITRATION TRIBUNAL

GRIEVANCE COORDINATOR

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In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO CIVIL SERVICE	*	
EMPLOYEES ASSOCIATION	*	Anna DuVal Smith, Arbitrator
LOCAL 11, AFSCME, AFL/CIO	*	
	*	Case No. 23-08-970502-1477-01-04
and	*	
	*	
OHIO DEPARTMENT OF	*	Marilyn Hill, Grievant
MENTAL HEALTH	*	Layoff & Bumping
	*	

* *

APPEARANCES

For the Ohio Civil Service Employees Association:

Penny Lewis, Staff Representative
Ohio Civil Service Employees Association

For the Ohio Department of Mental Health:

Malleri Johnson-Myricks, Labor Relations Officer
Georgia Brokaw, Labor Relations Officer
Ohio Department of Mental Health

I. HEARING

A hearing on this matter was held at 10:30 a.m. on December 7, 1999, at the Dayton campus of Twin Valley Psychiatric Systems, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties, pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter is properly before the Arbitrator and presented one issue on the merits, which is set forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed, and to argue their respective positions. Testifying for the Ohio Civil Service Employees Association, AFSCME Local 11, AFL/CIO (the "Union") were Cathy Graves, Chief Steward; Patty Graham, Classification/Arbitration Coordinator; and the Grievant, Marilyn Hill, Therapeutic Program Worker. Testifying for the Ohio Department of Mental Health (the "Department") were Rita Surber, Human Resource Administrator; Brad Rice, Personnel Manager; and Tim Wagner, Assistant Chief of Human Resources. Also in attendance were Fred Pitts, Chapter President; and Andrew Shuman, Labor Relations Specialist, Ohio Office of Collective Bargaining. A number of documents were entered into evidence: Joint Exhibits 1-15 and Union Exhibits 1-2. The oral hearing was concluded at 2:30 p.m. on December 7, 1999. Written closing statements were timely filed and exchanged by the Arbitrator on January 24, 2000, whereupon the record was closed. This opinion and award is based solely on the record as described herein.

II. STATEMENT OF THE CASE

This case arose when the Grievant, a Hospital Aide Coordinator I at the time, failed to receive her first choice during a paper layoff that occurred on May 1, 1997. The position she sought was DMHC Shopper, PCN 17710.0 in the Therapeutic Program Worker ("TPW") classification, which was then held by Georgianna DeMaris, an individual with less seniority than the Grievant. Unbeknownst to the Grievant at the time of the paper layoff, the position carried a designation of "Reasonable Accommodation Position." DeMaris had originally been given this assignment in 1991 when she was determined to be eligible for reasonable accommodation. The Grievant also held the position for a time after she returned to work after from an on-job injury and DeMaris was off work, probably on disability. She testified she enjoyed the work, which is why it was her first choice in the paper layoff. When the parties met to do the paper layoff, the management team asked the Union if the Grievant understood that she could displace into Demaris's TPW position, but not her reasonable accommodation duties. She would, therefore, be performing regular TPW duties. The Union caucused. When it returned, the Grievant took her second choice, which was also a TPW position on the first shift. However, she filed a grievance on May 2, 1997, alleging violation of Articles 18, 2.01, 17, 2.03, and 19.04 of the Collective Bargaining Agreement in that she "was forced to take [her] 2nd choice" (Joint Ex. 1). Being unresolved, the case came to arbitration where it presently resides, free of procedural defect, for final and binding decision.

The history of the position being sought by the Grievant has some bearing on the case. According to Tim Wagner, Assistant Chief–Human Resources, the Department has no light duty, so institutional chief executive officers use other means to accommodate employee needs.

Chief Steward Cathy Graves testified she had filed a number of grievances over the fact that employees had been placed in light duty/reasonable accommodation positions and stayed there for years without the positions being posted for others to bid on. Wagner agreed there had been inconsistencies across institutions, which the Department addressed in a new, centralized procedure beginning in 1996. Some employees had been reclassified in response to Union requests. In some cases the employee could not perform the essential functions of the job or no reasonable accommodation could be made, so the Department considered other options and so advised the Union because the decision could impact other employees. DeMaris was one of these. She was re-evaluated twice. Once in the fall of 1996 with the result that her accommodation was renewed. Then, in early 1997, the Department began the process to have her reclassified to Personal Services Worker, a Group 1 classification in Bargaining Unit 4. By the time of the paper layoff on May 1, the Union had not yet granted the Department's request, but DeMaris was eventually reclassified to Personal Services Worker in April 1998, after her second evaluation in the fall of 1997.

III. STIPULATED ISSUE

Did Management violate Articles 18.03 (Implementation of Layoff Procedure/Paper Layoff) and/or 18.04 (Bumping in the Same Office, Institution or County)?

IV. PERTINENT PROVISIONS OF THE CONTRACT

ARTICLE 18 - LAYOFFS

18.03 - Implementation of Layoff Procedure

The Employer shall conduct a "paper layoff" except where agencies are funded by multiple funding sources where a reduction in a funding source requires the agency to reduce positions immediately. In such situations, the Employer may implement the first round of reductions without conducting a "paper layoff".

The agency shall submit notice of a layoff to the Union no later than the time at which the agency submits its rationale to DAS/Division of Personnel. The Union shall be provided an opportunity to discuss the layoff with the Employer prior to the date of the paper layoff.

Paper Layoff

The Employer shall execute a layoff by identifying a time period when all potentially affected employees can exercise their bumping options before implementation of the "paper layoff". All affected employees shall exercise their bumping options in writing or by confirmed telephone communication, so that once the "paper layoff" is implemented, employees that have bumping rights shall assume their new positions or be placed on the recall list.

The parties agree to establish an operations area that can be used to coordinate the layoff and related personnel transactions during the time period when employees will be exercising their options. This operations area will include necessary management and the union representatives. OCSEA staff representatives may also be in attendance.

This procedure shall provide for the following:

A. The Employer and the Union will share all information about employee electives and will make all reasonable efforts to assure that each employee receives notice and forwards a written selection of their electives.

B. All potentially affected employees will be given a bumping selection form that identifies potential options. Each employee will select options available to them and will list them in the order of their priority. Employees will be given five (5) working days to complete and return the forms. Copies of the forms will be sent by the Employer to the Union.

C. All operations areas will have a specific schedule that will be make known to all representatives and employees.

D. Work shall be divided by classification groups to limit the number of people that need to be contacted in a time period. All employees will be advised that they will receive written notice of their final status when the displacement process is completed.

E. If an employee has not completed the "displacement selection form" and cannot be reached within fifteen (15) minutes, a union designee will make a selection on the employee's behalf. The selection will be to the least senior person in the same classification. If the employee is unable to utilize this right, the employee will be placed in the least senior position in the same or similar class grouping (Appendix I) in descending order. This choice will be final.

18.04 - Bumping in the Same Office, Institution or County

The affected employee may bump any less senior employee in an equal or lower position in the same, similar or related class series within the same office, institution or county (see Appendix I) provided that the affected employee is qualified to perform the duties.

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18.10 - Classification Groupings

For the purpose of this Article, Appendix I shall be changed as follows: In Unit 4 groupings 3 and 4 shall be combined.

APPENDIX I

Classification Groupings - Bargaining Unit 4

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3.	30271	Pharmacy Administrative Assistant
	30291	MH/MR Program Coordinator (see also Unit 14, Group 13)
	42741	Pharmacy Attendant
	44111	Hospital Aide
	44112	Therapeutic Program Worker
	44113	Hospital Aide Coordinator 1
	44114	Hospital Aide Coordinator 2
	44161	Licensed Practical Nurse
	44731	Community Adjustment Trainer 1
	44732	Community Adjustment Trainer 2
	30881	Mental Health Technician 1
	30882	Mental Health Technician 2
4.	18141	Rehabilitation Aide
	18531	Recreation Aide
	44210	Activities Aide
	44211	General Activities Therapist 1
	44212	General Activities Therapist 2
	44213	Activity Therapist Specialist 1
	44214	Activity Therapist Specialist 2
	30982	Activity Therapist Specialist 2
	31072	General Activities Therapist 2

V. ARGUMENTS OF THE PARTIES

Argument of the Union

The Union submits that the Department violated Article 18.04 in denying the Grievant's bid because the Grievant's first choice was a less senior employee in an equal or lower position in the same, similar or related class series. The Department justified its denial on the basis that the position was created as a reasonable accommodation and was without a work area. The Union submits that DeMaris did have a work area as defined by Appendix N, so the Department would have no justification for putting the Grievant on a ward had she assumed DeMaris's PCN. Article 17.01 does give the Department the right to determine which vacancies are to be filled, but it does not give the Department the right to create new positions (as it did in this case) and then fill them by reclassification instead of posting pursuant to

Article 17.03. Any reclassification has to be mutually agreed to, and DeMaris's reclassification was not agreed to because of the pending Hill grievance, and was not implemented until after the paper layoff. In addition, Article 19.04 prohibits pre-positioning. Although the subject position was originally created as a temporary one, the incumbent held it for five years with other employees performing the duties when she was absent. This shows there was a need for shopping duties to be performed. The Union therefore requests that the grievance be granted, the Grievant awarded her first choice bumping selection, and that the position of Personal Services Worker be posted as a vacancy for bidding.

Argument of the Department

The Department argues that the Grievant was not precluded from bumping into DeMaris's position, as even she admitted. What she was prevented from doing was assuming duties assigned to an individual as a reasonable accommodation. These duties, which do not fit within the TPW classification, were assigned based on medical documentation in order to comply with the Americans with Disabilities Act. They had been performed by DeMaris since 1991 with the knowledge of the Union and without objection.

The true basis of the grievance is not that the Grievant was denied PCN 17710.0, but that she was denied the opportunity to perform duties assigned to another as a reasonable accommodation. The Grievant had no medical condition preventing her from performing the regular duties of a TPW. Granting her claim would allow employees to assume accommodations without medical justification. This would create absurdities such as an employee bumping another with a lifting restriction assuming the same restriction. The grievance should therefore be denied.

VI. OPINION OF THE ARBITRATOR

This dispute came about because a disabled person was working outside her classification as a means of accommodating her disability. This was not the same thing as a job restructuring in which the disabled employee continues to perform essentially the same job but with some modifications of content to adapt to the employee's individual needs. Instead, it amounted to carving one duty (and a miscellaneous, low-importance one at that) out of the TPW classification to create a position that better falls into the Personal Services Worker classification where that duty is of major importance. As it happens, the Grievant would not have had bumping rights over the disabled employee had that employee been reclassified to Personal Services Worker before the paper layoff. Since she was not, the Grievant wants those duties as her job assignment. The Union asserts a number of reasons why they should be given to her, all of which center around what the Union views as the Department's impermissible creation of positions expressly for disabled employees. The question before this Arbitrator is whether such duties can be acquired by bumping in a layoff.

During a layoff, a displaced employee "may bump any less senior employee...provided that the [displaced] employee is qualified to perform the duties" (Article 18.04). When an employee moves into a new position, s/he assumes the duties of the position, not necessarily the duties being performed by the person s/he bumped. The reason for this is that duties performed by two or more different employees in the same position may vary on account of their individual differences, notably in this case their particular disability or lack thereof. If, for example, the Grievant was qualified as disabled, her assigned duties in whatever TPW position she bumped into would be ripe for adjustment as a reasonable accommodation, but if

she, herself, were bumped, the person moving into her position would perform the same collection of duties in the same way only if s/he qualified for the same accommodation. In other words, the accommodation follows the person, not the job. To put it in terms of Article 18.04, the Grievant in this case was senior to DeMaris and qualified for TPW duties. She was therefore entitled to DeMaris's TPW PCN 17710.0. But unless she was qualified disabled at the time of her bid, she was not qualified for DeMaris's accommodated duties. By this reasoning, the Department did not violate Article 18.03 or 18.04.

The problem with this case, though, is that the Department did not just make minor adjustments within a regular TPW's position description. Instead, the position's duties as a whole, not just the individual's, were established as a reasonable accommodation to a particular individual's disability. So, on the one hand, the Grievant is not entitled to the duties because they are another person's reasonable accommodation duties, but on the other hand, she is entitled to them because they are those of the position. However, as noted above, the position had not yet been reclassified to Personal Services Worker. Had it been so, the Grievant would not have been entitled to the duties because the position was outside her classification grouping. Awarding her DeMaris's duties at the paper layoff would, therefore, have had the effect of both giving her another employee's accommodation (to which she was not entitled) and having her work outside her classification in a grouping into which she was not entitled to bump. Therefore, the Department's mistake, if any, was not in its application of the layoff provision, but in its failure before the layoff to reclassify the position and either reclassify DeMaris or post the vacancy, and/or deal with DeMaris in a different way.

Whether, in fact, the Department can set aside a position for accommodating qualified disabled employees without opening it up for bid by otherwise qualified but nondisabled employees without violating Articles 17, 19, or any other provision of the Collective Bargaining Agreement is a question beyond the reach of this Arbitrator, whose authority is constrained by the stipulated issue submitted by the parties. The parties have chosen to limit the Arbitrator to considering whether the Department violated Articles 18.03 and/or 18.04, not whether it violated Articles 17, 19, or any other provision. Unfortunately, this means that while this award answers the particular question submitted, it cannot resolve the underlying issue.

VII. AWARD

> Management did not violate Articles 18.03 or 18.04 in its treatment of the Grievant on May 1, 1997. The grievance is denied.

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
March 9, 2000
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