#737

REVIEWED BY
12/4/00
DEC - 4 2000
GRIEVANCE COORDINATOR

VOLUNTARY LABOR ARBITRATION TRIBUNAL

* *

In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO CIVIL SERVICE	*	
EMPLOYEES ASSOCIATION	*	Anna DuVal Smith, Arbitrator
LOCAL 11, AFSCME, AFL/CIO	*	
	*	Case Nos. 27-04-~~19970228~~ (97-03-21) 187-01-03 &
and	*	27-04-~~19990804~~ (99-08-04) 381-01-03
	*	Paul Dowler and Geraldine Winfield,
OHIO DEPARTMENT OF	*	Grievants
REHABILITATION & CORRECTIONS	*	Post Assignment

* *

APPEARANCES

For the Ohio Civil Service Employees Associations/AFSCME Local 11:

George L. Yerkes, Staff Representative
Carrie Cassady, Associate General Counsel
Ohio Civil Service Employees Associations/AFSCME Local 11

For the Ohio Department of Rehabilitation and Corrections:

Joseph B. Shaver, Chief of Labor Relations
Ohio Department of Rehabilitation and Corrections

James M. Lendavic, Labor Relations Specialist
Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 9:00 a.m. on October 4, 2000, at the Corrections Medical Center in Columbus, Ohio, 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 Associations/AFSCME Local 11 (the "Union") was Geraldine Winfield, Corrections Officer. Also in attendance were Vanessa Sykes, Chapter President; and Roxie Turner, Chief Steward. Testifying for the Ohio Department of Rehabilitation and Corrections (the "State" or "ODRC") was Rodney L. Francis, Warden, Corrections Medical Center. Also present was Rhonda Bell, Labor Relations Officer, Corrections Medical Center. A number of documents were entered into evidence: Joint Exhibits 2-6, 13-14, 17-24 and 26. The oral hearing was concluded at 12:00 p.m. on October 4, 2000, whereupon the record was closed. This opinion and award is based solely on the record as described herein.

II. STATEMENT OF THE CASE

The Ohio Department of Rehabilitation and Corrections has a $26 million contract with the Ohio State University hospitals ("OSU") wherein OSU provides certain health care services for inmates that ODRC is unable to provide through its own facilities. The Union is

not a party to this contract. One provision of this contract permits each party to restrict from its own facilities individuals under the control of the other:

> 14. All physicians and personnel provided by the HOSPITALS under this AGREEMENT are bound to observe the laws, regulations and policies of the State of Ohio and the DEPARTMENT governing institution operations. In recognition of the sensitive nature of penal institutions, the HOSPITALS agrees that in the event the DEPARTMENT has reason to believe that any of the individual physicians or personnel provided under this AGREEMENT have failed to observe such laws, rule or regulations, the DEPARTMENT may give written notice to the HOSPITALS of such fact and the reasons therefore; and if the problem cannot be resolved after a reasonable amount of time, the HOSPITALS agrees to remove the individual about whom dissatisfaction has been expressed by the DEPARTMENT, and to cover with other physician or appropriate personnel until an approved replacement can be found. The DEPARTMENT agrees to allow the HOSPITALS a reasonable amount of time to find an approved replacement. The DEPARTMENT agrees to a reciprocal arrangement regarding correctional staff assigned to duty at the HOSPITALS or performing services under this AGREEMENT, who fail to observe laws, rules or policies of the HOSPITALS. (Joint Ex. 17)

The applicable OSU policy governing workplace standards of conduct also makes reference to restricting corrections officers from duty in OSU's hospitals:

> XVI. CORRECTIONAL STAFF BEHAVIOR
>
> Correction Officers will act in a courteous and professional manner when dealing with Hospitals' personnel, other patients, and visitors. They will not eat or drink anything from the inmate's food tray nor will they use the Hospitals' eating facilities except when off-duty or properly relieved. Correction Officers will not read, watch television, use personal radios, fraternize with Hospitals' staff or sleep while on duty. Correction Officers are not to eat or drink in patient care areas. Infractions should be immediately reported to the Hospitals' Department of Security and Safety who will act as a liaison with the Correction Supervisor on duty.
>
> XVII. ENFORCEMENT
>
> Correction Officers assigned to guard inmate patients are responsible for adhering to the procedures set forth herein. The Warden at the Corrections Medical Center is responsible for providing on-site supervision to ensure that Correction Officers are properly stationed and working within established guidelines. Any conflicts between correctional officers and the Hospitals staff and any violations of the procedures established herein should immediately be brought to the attention of the Hospitals' Security and Safety Department.
>
> The Security and Safety Department will investigate the situation and report it to the Corrections Supervisor on duty. University Hospitals reserves the right to request that specific Correction Officers not be assigned to duty in the Hospitals. The Warden will ensure that these requests are carried out or will meet with a representative of Hospitals Administration to resolve the problem in another appropriate manner. (Joint Ex. 18)

Rodney L. Francis, Warden of the Corrections Medical Center ("CMC"), testified that this contract advantages ODRC in several ways, notably providing centralized medical care and hospitalization, up to and including solid organ transplants, for inmates while giving each party control of personnel issues affecting its ability to achieve its own mission. Over the years, each party has had occasion to restrict access of the other's staff.

This case concerns the removal of two corrections officers from posts at OSU which they had obtained through the Pick-A-Post Agreements between ODRC and OCSEA. These agreements allow employees to bid on jobs based on seniority. In both cases, the corrections officers were reassigned to other duties and replaced by officers with less seniority. Neither officer was disciplined as a result of the incidents cited by OSU and neither had any active discipline on record. The first of these officers, Paul H. Dowler, was hired on September 15, 1986. His evaluations for 1997-1999 were good, meeting or exceeding his employer's expectations. In January 1997 he was working a Transportation/Utility post when Susan E. Devlin, R.N., wrote Warden Francis requesting that Dowler not be assigned to OSU because of several incidents potentially compromising to patient care. As a result of this, and subsequent investigation by ODRC notwithstanding Captain L. Smith's conclusion that "this incident... does not justify... his being restricted from OSU," ODRC reassigned him. This action was timely grieved on February 28, 1997, citing Articles 2.02, 16, 24 and 44.01 of the Collective Bargaining Agreement as well as the CMC Pick-A-Post Agreement. On May 16, 2000, while the case was pending, Officer Dowler resigned, but the Union presses his case, seeking lost overtime for him.

The second grievant, Geraldine Winfield, was hired on September 24, 1990. Like Grievant Dowler, her evaluations for 1996-1998 were good and she has a clean discipline record. In November of 1996, CO Winfield filed a complaint with the Ohio Board of Nursing against a nurse at OSU. This complaint was subsequently dismissed. However, about a week after it was filed, OSU requested that Winfield be removed from her post. Nurse Manager Karen Durano's written request of December 23 cites adversarial relationships and distorted incident reports. Winfield testified that she was not told why she was being pulled from OSU at the time of the restriction, but later learned from the warden that it was because of her complaint. Warden Francis testified that corrections officers learn about their reassignments through their supervisors, but that he, himself, had several discussions with Winfield about it. He also confirmed that OSU's reason for wanting her removed was her complaint, that the complaint's allegations were unfounded, and that it had been detrimental to the affected nurse. ODRC did, in fact, pull Winfield from her post at OSU and reassign her to other duties. Winfield did not grieve this action until late 1997. On July 14, 1999, after she again bid on an OSU post, but lost it to a less senior officer when OSU refused to take her back, she grieved again, citing Article 2, 13, 16, 24, and 44, and Appendix Q of the Collective Bargaining Agreement. This grievance, like Dowler's, was subsequently appealed to arbitration, where both reside, without objection, for final and binding decision.

III. STIPULATED ISSUE

Were the grievants removed from their posts and/or denied their bids at Ohio State University Hospital in violation of the Collective Bargaining Agreement? If so, what shall the remedy be?

IV. PERTINENT PROVISIONS OF AGREEMENTS

August 1994 Corrections Medical Center/OCSEA Pick-A-Post Agreement

A. PICK-A-POST PROPOSAL - GENERAL

1. Management's right to assign is limited only to the extent specified within this document.
2. Management retains the right to deny an employee's bid to a post for "good management reasons."
3. Management reserves the right to "pull and move" employees from their selected or assigned post for "good management reasons" to meet operational needs.

***

11. All posts will be filled by seniority bid and will be considered non-rotating.

***

13. Management has the right to remove an employee from his/her post for unsafe acts, discourteous treatment of the public (visitors and OSU staff) or DR & C staff, incompetency, or any other acts of malfeasance, misfeasance, or nonfeasance. The standard for such removal from a post shall be "good management reasons." It shall be management's discretion whether to discipline an employee before removing an employee from his/her post.

E. PICK-A-POST PROPOSAL - CANVAS

***

8. As noted, management has the right to reject a bid for a particular post based on good management reasons or on the McDowell guidelines....

September 2, 1997 Pick-A-Post Parameters

C. The local agreement must include the following pull and move language:

***

2. After consultation with the affected employee and the union, management may remove an employee from a post for good management reasons.

J. Management has the right to deny any permanent bid for good management reasons after consultation with the affected bidder and the union. The union has the right to grieve the decision and document by management as agreed upon after meeting. (Joint Ex. 4)

1998 Corrections Medical Center/OCSEA Pick-A-Post Agreement

***

D. After consultation with the affected employee and the Union, Management may remove an employee from a post for good management reasons.

***

F. Management retains all rights under Article 5 of the Collective Bargaining Agreement.

G. The Union reserves the right to grieve any management action taken under Article 5.

H. Any immediate threat to the health, safety, and security of the Institution shall take priority over the pick-a-post agreement.

***

K. Management has the right to deny any permanent bid for good management reasons after consultation with the affected bidder and the Union. The Union has the right to grieve the decision as documented by Management and as agreed upon after meeting.

V. ARGUMENTS OF THE PARTIES

Argument of the Union

In the eyes of the Union, the State is hiding behind a third party contract to deny collective bargaining rights. It argues first that in Article 44.01, the Contract specifically gives the Collective Bargaining Agreement priority over all "conflicting State statutes, administrative rules, regulations or directives." The ODRC/OSU Contract is therefore subordinate to the Collective Bargaining Agreement and cannot change negotiated rights. Among the rights guaranteed by the parties' negotiated agreements are the pick-a-post rights for corrections officers which evolved from the 1988 Goldstein award to the 2000-2003 Agreement. No collectively bargained language permits pick-a-post rights to be subverted by a third-party agreement.

The 1997 and 2000 Pick-A-Post Parameters which formed the basis for local agreements permit denial of a bid for "good management reasons." The Union agreed to bid denials because such denials would be documented and their reasons discussed with the affected employee. In addition, the Union would retain the right to grieve. Noticeably absent from the ODRC/OSU Contract are such due process protections. That contract contains no right to grieve. Bargaining unit rights are therefore at the mercy of OSU hospital administrators without appeal. Since Grievant Winfield's bid was denied solely because of OSU's wishes, the Union's only recourse is this arbitration.

What the Union seeks here is development of the "good management reason" standard along the lines of "just cause." On point are two panel decisions, the *Crosbie* decision (Case No. 27-15-19931229-309-01-03, Arbitrator Charles Ipavec) and the *Appel* decision (Case No.

27-25-19931124-627-01-03, Arbitrator Nels Nelson). Both of these required management to prove a quantifiable problem in order to sustain a "good management reason" claim. Not only did management fail to establish a quantifiable problem (relying only on OSU's order to remove the grievants), but it never met with the grievant over the issue. For this reason, the grievances should be sustained. As a remedy, the Union asks that the State be ordered to cease and desist from hiding behind the ODRC-OSU Contract, that Officer Winfield be returned to her OSU post, and that Mr. Dowler be awarded overtime lost on account of his restriction from his Transportation post.

Argument of the State

The State submits that from the inception of pick-a-post, management has retained the right to deny bids or pull employees for "good management reasons." In some local agreements, there are "meet and confer" provisions to enhance management-employee communications. No such provision was in place for CMC at the time the grievants were reassigned, although the parties later agreed to consultation.

Regarding the Union's argument that it is not a party to the ODRC/OSU Contract, the State points out there have been two such contracts negotiated since the incidents of this case. For neither did the Union neither request to be a party nor did it file unfair labor practice charges. As far as the cases concerning Senate Bill 99 are concerned, the State submits that there is a big difference between the law and the ODRC/OSU Contract. The former adjusted collectively bargained wages whereas the Pick-A-Post Agreements have always retained management rights.

Referring to the *Appel* decision, the State submits that a just cause standard does not apply. What the Union has to show is that management's action was arbitrary or capricious, and the Union has failed to carry its burden here. Management does not hide behind its contract with OSU. In fact, the warden pursued the matter with OSU and was concerned about the impact of removal on the workforce.

The consequences of this decision are enormous, says the State. If it breaches the contract with OSU, and OSU withdraws that contract, the State will be limited in its ability to provide for inmate medical needs, placing it at risk of extreme liability. The State submits that the interests of two employees should not be placed higher than that liability.

The State concludes that it has not violated the Contract and the grievances should accordingly be denied.

VI. OPINION OF THE ARBITRATOR

To begin with, it must be noted that under the agreements negotiated by the parties, seniority rights to a post assignment are not absolute. At least since the 1994 Agreement covering CMC, the most senior employee's bid may be denied and employees may be removed from their posts for "good management reasons." This standard is not as high as the just cause standard required by the Contract for discipline. The Union may wish it to be so, but that clearly is not what the parties agreed to. The Union has had several opportunities to raise the standard along just cause lines via bargaining, but it has either not raised the issue or has been unable to persuade the State to yield. I cannot now give the Union what it did not obtain in bargaining. What I can and must do is apply the negotiated standard to the facts of these grievances.

As panel arbitrators have previously held, "good management reasons" means "not arbitrary or capricious." To this I would add "discriminatory." In other words, management's decision has to be reasonably well related to the institution's mission, free of invidious motivation, and based on the exercise of reason, judgment and discretion. The Union is correct that the State cannot bind itself such that all discretion is removed. Such would be the case if it blindly hid behind a contract in which all discretion was given to a third party without the consent of the Union. The Union did not agree that OSU would exercise "good management judgment" regarding post assignments, but that ODRC would do so. Therefore, when presented with an OSU request that a corrections officer be removed from a post, ODRC may not simply reactively act on the request denying the officer his preferred assignment, but must probe behind the face of the request and use its own independent judgment as to whether there is a problem warranting a solution and, if so, whether reassignment and not some other solution is called for. Indeed, although I am not empowered and specifically decline to interpret the ODRC/OSU Contract, I do observe language that could be read to permit problem resolution in such a manner. Having gone through such a process and being unable to agree with OSU on a solution other than reassignment, ODRC then has to decide whether it, ODRC, has "good management reason" to reassign. In so doing, it may consider factors such as working relationships with hospital staff, OSU's conclusions regarding its ability to achieve its own mission and fulfill its contract with ODRC, the likelihood of OSU repudiating that contract and the impact of such repudiation on ODRC's ability to achieve its own mission, but the decision must be a bona fide exercise of discretion and not simply a shifting of that responsibility to OSU.

Secondly, the Union urges me to find the due process right to a pre-deprivation meeting with management, again along the lines of the just cause concept. I am unable to find such a requirement in the 1994 Agreement, either explicitly or impliedly. The fact that "consultation" language did not appear until the 1997 Parameters implies that the parties knew "good management reasons" did not demand pre-reassignment and pre-bid-denial conferences. Thus, for me to find for the Union on this, I would have to add a provision the parties acknowledged (through their bargaining subsequent to the 1994 Agreement) was lacking. This I cannot do as I am authorized only to interpret and apply the Agreement, not to add to it (Article 25.03, Joint Ex. 2).

I now apply the above to Officer Dowler's grievance which arose under the 1994 Agreement containing no pre-reassignment consultation provision. Documents admitted into evidence establish that Officer Dowler did, in fact, write an incident report defending himself and was interviewed by Capt. Smith, that one of the nurses who filed a complaint against him later wrote Warden Francis stating she rescinded her complaint, and that the investigating officer, Capt. Smith, concluded the incident did not warrant Dowler's restriction from OSU. Warden Francis, however, testified he questioned OSU about reinstating Officer Dowler but that OSU thought the grievant's behavior sufficiently disruptive to justify his exclusion. This describes not an arbitrary, unquestioning reaction to the hospital's request, but a reasoned consideration of the allegations from several points of view including those in support of the grievant. In the final analysis, the warden deferred to OSU despite the conclusion of the captain, but that does not, in and of itself, flaw his decision. What he relied on and ultimately gave greater weight to, was the provider's view that the grievant's behavior was disruptive to

patient care. I therefore find the warden did not act arbitrarily, capriciously or discriminatorily in restricting Officer Dowler from OSU but had a good management reason for reassigning him. It thus did not violate the Collective Bargaining Agreement with regard to him.

Turning now to Officer Winfield, her grievance on the removal was untimely, but in any event, the removal occurred before the consultation requirement was in effect. Her subsequent bid, however was governed by the 1998 Agreement, which does contain consultation rights. Nowhere in the record do I find allegations or evidence that management failed to consult the grievant and the Union at the time of her bid, only that she was not informed in 1996 of the reason for being restricted. In any case, by the time of her bid in 1999, she had already learned from the warden the reason she lost the post in the first place, and the warden, himself, testified he had discussions with her about it. Moreover, the Officer Winfield's bid of June 16, 1999, indicates that she knew what incident led to her restriction and it contains a defense. It therefore appears to me that the Officer Winfield had enough knowledge at the time of her bid to speak to the issues that kept her from the assignment she wanted. Thus, there was no due process violation of the 1994 Agreement because that agreement does not require a pre-reassignment conference. And there was no due process violation of the 1998 Agreement because (1) there is no evidence of lack of a pre-denial conference and (2) there is evidence Officer Winfield was informed of the reason she lost the assignment in the first place, which gave her the opportunity to address that issue.

Looking finally at Management's reason for rejecting her bid, Warden Francis's denial referred only to "contract language from O.S.U." (Joint Ex. 22c). This certainly suggests that

he abdicated his responsibility and improperly hid behind the ODRC/OSU contract, thus acting arbitrarily. However, he also testified that he did ask OSU to reconsider its decision. And when he did so, OSU adhered to its previous position that Officer Winfield's behavior was disruptive of working relationships impacting on the quality of patient care, and that this was serious enough to warrant continuation of the restriction. Although the warden did not have an ODRC investigation to consider as he did in the Dowler case, he did have Officer Winfield's statement of defense and whatever she included in her "packet of documents (Joint Ex. 22c). These appear to have played only a minor, if any, role in his decision, but they were available to him to use in his negotiations with OSU if he found them persuasive. In the final analysis, as with Dowler, he relied on the hospital's statement of cause, not simply some bald statement that Winfield was unacceptable, and this cause is sufficient to establish "good management reason." He did not say so in his denial of the grievant's bid, and this was a mistake, but it does not invalidate his decision. For these reasons, I find no violation of the Collective Bargaining Agreement with respect to Officer Winfield.

VII. AWARD

The grievances are denied in their entirety.

Anna DuVal Smith

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
November 29, 2000