

Howard D. Silver
Arbitrator
Columbus, Ohio

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In the Matter of Arbitration
Between

Case No.
22-02-(06-25-88)-59-02-12

The State of Ohio

Grievant: Lenora M. Harding

and

The Ohio Health Care Employees Union
District 1199, WV/KY/OH
National Union of Hospital and
Health Care Employees, AFL-CIO

APPEARANCES

For The State of Ohio

Rodney Sampson, Management Representative
Office of Collective Bargaining

John Connelly, Advocate
Ohio Rehabilitation Services Commission

For The Ohio Health Care Employees Union,
District 1199, WV/KY/OH
National Union of Hospital and
Health Care Employees, AFL-CIO

Edward Davis, Delegate
District 1199

Cheryl Hill, Advocate
District 1199

ISSUE

Did the State of Ohio violate the Contract in denying the Dodd Hall vacancy to Lenora Harding on 6/25/88; and if so, what should the remedy be?

The hearing in this matter was held on September 11, 1989, within the offices of the Ohio Department of Administrative Services's Office of Collective Bargaining, 65 East State Street, Columbus, Ohio. The parties were afforded a full and fair opportunity to present testimonial and documentary evidence, examine and cross-examine witnesses, and make arguments supporting their positions. The record in this matter was closed on September 11, 1989.

BACKGROUND

Lenora Harding, the grievant in this matter, is employed by the Ohio Rehabilitation Services Commission as a Vocational Rehabilitation Counselor 4. Ms. Harding has worked for the State of Ohio since 1967 and is presently employed within the Columbus Metropolitan Office of the Commission's Bureau of Vocational Rehabilitation.

Ms. Harding began her state service as an Activity Therapist at Longview State Hospital during summers she was enrolled as a college student. In July, 1970 Ms. Harding was employed as a Youth Leader by the Ohio Department of Youth Services (then named the Ohio Youth Commission). Ms. Harding transferred to the Ohio Rehabilitation Services Commission in 1973 and began her tenure with the Commission as a Rehabilitation Counselor 1. Ms. Harding transferred from the Cincinnati area to the Columbus Metropolitan Office, and in 1982 Ms. Harding was classified Vocational Rehabilitation Counselor 2 and employed as a counselor manager

within the Columbus Metropolitan Office. Ms. Harding testified that in 1982 her caseload amounted to, on the average, one hundred twenty cases, eighty percent of which involved severely disabled workers, with fifty percent of this group comprised of severely mentally disabled clients and the other fifty percent composed of severely physically disabled clients. Ms. Harding was responsible for determining client eligibility and providing to eligible clients rehabilitation services through the coordination of vocational, physical therapy and/or medical services, all directed to moving a client to a state of vocational health necessary to securing and maintaining gainful employment. These services were to be provided under rehabilitation plans prepared by Ms. Harding and others within the Commission.

In early 1982 the Columbus Metropolitan Office underwent a series of layoffs which included positions filled by vocational rehabilitation counselors and counselor managers. Ms. Harding exercised displacement (bumping) rights and by June, 1988 was serving as a Vocational Rehabilitation Counselor 4, providing duties similar to those assigned to other vocational rehabilitation counselors working within the Columbus Metropolitan Office and at other locations within the Commission.

The group of Columbus Metropolitan Office vocational rehabilitation counselors among whom Ms. Harding worked numbered six, when counting Ms. Harding. Another position performing duties similar to the range of responsibilities assigned to the six vocational rehabilitation counselor positions within the Columbus

Metropolitan Office is a position located in Dodd Hall, located within The Ohio State University's medical complex. The vocational rehabilitation counselor position located at Dodd Hall is assigned duties similar to those carried out within the Columbus Metropolitan Office, but this position is not a position operated by the Columbus Metropolitan Office.

The Dodd Hall position became vacant and the position was opened to bids by eligible bargaining unit members as required by the collective bargaining agreement in effect between the parties from 1986 through 1989. This contract appears in the record as Joint Exhibit 1. The provisions of this contract address the filling of the Dodd Hall position under procedures and grants of rights and privileges to the parties.

Ms. Harding and other bargaining unit members bid on the Dodd Hall position and Grievant Lenora Harding was not selected to fill this position. Had Ms. Harding been selected, the result of this job action would have been a lateral transfer with no change in seniority, classification or salary. Of the five people who applied for the Dodd Hall position, Grievant Harding had the most seniority.

Ms. Harding has a total of seventeen years' service with the Ohio Rehabilitation Services Commission and has, within this seventeen year work record, received one disciplinary action, a three day suspension served on September 10, 11 and 12, 1986. The suspension occurred when Ms. Harding was classified Vocational Rehabilitation Counselor 3 and was based on services being directed

to clients through Ms. Harding prior to the time that proper authorizations had been secured by Ms. Harding to pay for the services, authorizations required to be secured from higher administrative authority within the Commission. The narrative body of the suspension, which appears in the record as Joint Exhibit 7, provides that in January of 1986 a case review revealed that Ms. Harding had allowed psychological evaluations to be performed prior to cases being opened and without prior authorization. The suspension also complains that on May 28, June 2 and June 10 of 1986 it was again discovered that Ms. Harding had additional cases involving improper authorization of services. The suspension issued to Ms. Harding sets out thirteen separate citations to a Commission manual alleging violations of the manual resulting from the lack of prior authorization in activating services within cases for which Ms. Harding was responsible.

It should also be noted that within the suspension issued to Ms. Harding, the Commission noted its appreciation for Ms. Harding's honesty in accepting responsibility for her actions, as well as her professional commitment to the programs of the Commission, and acknowledged Ms. Harding to be an asset to the Commission and its programs. The suspension found, however, that the conduct of Ms. Harding in these cases, and especially in the second set of cases, to be a neglect of duty, inefficient and insubordinate in that rules which were known to Ms. Harding were not followed. It should be reiterated that this is the only disciplinary action directed to Ms. Harding in her seventeen years

with the Rehabilitation Services Commission. Also within the record of this matter, Union Exhibit 1, are the performance evaluations of Ms. Harding for years 1983 through 1987, inclusive. It should be noted as well that Ms. Harding was accorded a predisciplinary hearing prior to the enforcement of the three day suspension, a due process procedure not required by contractual language.

During the predisciplinary hearing Ms. Harding admitted candidly and honestly that the particulars within the three day order of suspension were true. Ms. Harding did not appeal the suspension; made no complaint of any kind to the Equal Employment Opportunity Office within the Commission or the EEO office within the Ohio Department of Administrative Services; filed no complaint alleging discrimination with the Ohio Civil Rights Commission; and made no appeal of either her 1986 or 1987 performance evaluation.

At hearing Edward Davis, a Vocational Rehabilitation Counselor 4 employed within the Rehabilitation Services Commission's Bureau of Vocational Rehabilitation's Office of County and Deaf, within Union and Licking Counties, explained that he is assigned and performs duties very similar to those assigned to the position presently filled by Ms. Harding, as well as the duties assigned to the Dodd Hall position. Ms. Davis testified that he began as a counselor with the Bureau of Services for the Visually Impaired and in April, 1979 transferred to the Portsmouth BVR Office to serve as a counselor therein. Mr. Davis was subsequently promoted to Counselor Manager, a layoff ensued, and Mr. Davis eventually

transferred to the Columbus Metropolitan Office as a counselor in February, 1987. Mr. Davis spent eight months within the Columbus Metropolitan Office before transferring to the Office of County and Deaf in October, 1987.

Mr. Davis testified that while serving within the Columbus Metropolitan Office he had been evaluated in 1987 by the same supervisor who evaluated Ms. Harding in 1986 and 1987. Mr. Davis testified that he received the lowest performance evaluation he had ever received to that point in time, a performance evaluation that was nine points lower than the lowest evaluation he had received while serving in the Portsmouth Office. Mr. Davis stated that this was one of the reasons that he decided, after eight months within the Columbus Metropolitan Office, to transfer to the Office of County and Deaf. Mr. Davis expressed the opinion that performance evaluations prepared by the supervisor of his position while within the Columbus Metropolitan Office, the same supervisor who evaluated Ms. Harding in 1986 and 1987, were, in comparison to averages of other raters within the Commission, below average, being generally more negative than evaluations performed by other similarly situated supervisors.

Mr. Davis also identified Union Exhibit 3, a memorandum dated September 8, 1987, which has attached to it a page from the fiscal year 1987/1988 Rehabilitation Services Commission's Affirmative Action Plan. This page reads as follows:

Analysis of Agency's Current Status

The agency uses progressive discipline for all employees, even those who are not represented by a collective bargaining agreement. Discipline, other than a verbal warning, must be sent through the proper channels of approval before the recommended discipline is imposed. It should be noted that the recommended discipline can be modified and does not have to follow the request.

Problem Areas

Minorities are receiving a larger percentage of suspensions than are non-minorities, when it is measured against a total percentage of minority employees for the agency.

Corrective Action to be Taken (specific action, persons responsible and start dates)

Starting on August 3, 1987 all supervisors will be trained on how to properly discipline employees. EEO aspects of discipline will be part of that training.

Attached to the above is the final page of Union Exhibit 3 which contains statistics on Commission suspensions from July 1, 1986 through June 30, 1987. There were seventeen total suspensions during this time period, with four white females being suspended, four white males being suspended, eight black females being suspended, and one black male being suspended. These statistics also reflect that of the employees suspended for five days or more, two white males and five black females received this more serious punishment, with all four white females and the other two white males, and the black male, receiving suspensions for one to three days.

RELEVANT CONTRACT PROVISIONS

Section 26.04 of Article 26 of the Contract, an article entitled "Seniority", reads as follows:

26.04 Shift and Assignment Openings

Assignment openings shall be filled by the qualified employee within the classification at the work site having the greatest state seniority who desires the opening.

Section 28.02 of Article 28 of the Contract, an article entitled "Vacancies", reads as follows:

28.02 Awarding the Job (Transfers and Promotions)

Applications will be considered filed timely if they are received or postmarked no later than the closing date listed on the posting. All timely filed applications shall be reviewed considering the following criteria: qualifications, experience, education and work record. Where applicants' qualifications are relatively equal according to the above criteria, the job shall be awarded to the applicant with the greatest state seniority.

Job vacancies shall be awarded in the following sequential manner:

A. The job shall first be awarded to an applicant working at the facility where the vacancy exists in accordance with the above criteria;

B. If no selection is made from A above, the job shall be awarded to an applicant working in the agency where the vacancy exists in accordance with the above criteria;

C. If no selection is made from B above, the job shall be awarded to an applicant working in the bargaining unit in accordance with the above criteria;

D. If no selection is made from C above, the job may be awarded by hiring a new employee.

Within non-institutional agencies and within the Adult Parole Authority, step A above shall not apply.

This agreement supercedes Ohio Civil Service Laws and Rules regarding eligibility lists for promotions.

POSITIONS OF THE PARTIES

The Union has contended that Section 26.04 controls the selection process for openings like the one in Dodd Hall, that Ms. Harding is obviously qualified for the classification needed to fill this position, and as Ms. Harding works at what can be construed as the same work site as the Dodd Hall position, and as she has the greatest state seniority, and as she desires the opening, she is entitled to be chosen to fill this position.

In response to this contention, Management claimed at hearing that the Union had never before raised Section 26.04 as a basis for remedying Ms. Harding's grievance, and had never prior to the hearing in this matter claimed that Section 26.04 of the contract applied to Ms. Harding's grievance. Management contended that the Union had never before argued that Ms. Harding's position was located at the same work site as the Dodd Hall position and further claimed that during all previous steps within the grievance trail

of this matter the parties had focused on Section 28.02 of the collective bargaining agreement between the parties. The grievance trail within the record of this matter appears as Joint Exhibit 2.

The Union urges that in the event the arbitrator finds that Section 26.04 does not control in this grievance, but instead finds Section 28.02 is the contractual language to be used in determining Ms. Harding's grievance, Ms. Harding's grievance is still entitled to a remedy under the language of Article 28. In support of this position the Union claims that Ms. Harding's qualifications for the Dodd Hall position, under the language of Section 28.02 of the contract, are clearly equal to the employee chosen to fill the Dodd Hall position in terms of qualifications, experience, education and work record; and the grievant is demonstrably superior to the selected employee in seniority. The Union contends that this being the case, Section 28.02 provides that where applicants' qualifications are relatively equal, the job shall be awarded to the applicant with the greatest state seniority, in this case Lenora Harding.

The Union also contends that the evaluation system utilized by Management to reach the conclusion that Ms. Harding possessed qualifications which were not relatively equal to the employee chosen for the Dodd Hall position, is a system which is discriminatory in its effect and therefore invalid when used to deny the grievant the Dodd Hall position to which she is entitled.

Management at hearing argued that all applications for the Dodd Hall position, pursuant to the language of Section 28.02, were

to be addressed by Management if received during the posting period, and considered by Management in terms of qualifications, experience, education and work record. Management points out that according to Article 5 of the contract between the parties, an article entitled "Management Rights," the employer reserves, exclusively, all of the inherent rights and authority to manage and operate its facilities and programs, except to the extent that this exclusive reservation of authority is modified by language contained within the collective bargaining agreement between the parties. Management argued that as there is nothing within Section 28.02 which defines how applications for the Dodd Hall position are to be considered for purposes of qualifications, experience, education and work record, how this consideration is to be done is within the exclusive discretion of Management and does not require consultation with or agreement of the Union.

Management provided the testimony of Oliver Hardin at hearing, Manager of the Division of Human Resources within the Ohio Rehabilitation Services Commission. Mr. Hardin participated in September and October, 1986 in the development of the system utilized by Management to consider the qualifications, experience, education and work record of applicants for vacant positions to be filled under operation of Section 28.02 of the contract.

Mr. Hardin identified Management Exhibit 2 as the system developed by Management and employed in deciding who to select for the Dodd Hall position under operation of Section 28.02. This system, a point factor system, was used by Management to find that

as an applicant for the Dodd Hall position, Ms. Harding's qualifications were not relatively equal to the employee selected to fill this position effective June 25, 1988.

Mr. Hardin explained the point factor system used to supersede the seniority of the applicants for the Dodd Hall position in June, 1988. This system begins with a review of the applicants' minimum qualifications necessary to filling the vocational rehabilitation counselor position at Dodd Hall. Of the applicants for this position, five were found to possess the minimum qualifying backgrounds to be considered for the Dodd Hall position.

Of the five applicants who satisfied minimum qualifications appearing on vocational rehabilitation counselor classification specifications developed by the Ohio Department of Administrative Services, each was evaluated under a three part system addressing work record, education and experience, with each category amounting to one-third of the final point total for each applicant.

Mr. Hardin explained that the work record category could produce a maximum of 33 points and was determined by performance evaluations in the two years previous to the applicant's bid, and was also affected by disciplinary actions imposed within the same time period. Mr. Hardin explained that performance evaluation forms used in 1986 and 1987 for Ms. Harding and the other applicants contained within them nine different evaluative topics, including quality of work, quantity of work, knowledge of work, adaptability, dependability, cooperation, judgment, initiative, and personality. For quantity of work and knowledge of work, each had

a maximum of 15 points available, and for all other work evaluation topics a maximum of ten points was available. A maximum of 100 points was possible under the performance evaluations used in 1986 and 1987, the time period utilized by the point factor system in determining the applicant to be selected among the five who applied and were eligible for the Dodd Hall position.

Mr. Hardin explained that totals from performance evaluations were calculated and points assigned based on performance evaluation points. For example, a performance evaluation average of forty or fewer total points was assigned 0 points for purposes of work record under the point factor system. A performance evaluation average totalling 41 to 60 points resulted in 11 points for work record within the point factor system; a performance evaluation average totalling 61 to 80 points resulted in 22 points within the work record section of the point factor system; and a performance evaluation average of 81 to 100 points resulted in a maximum 33 points for the work record portion of the point factor system. Mr. Harding explained that these four ascending categories represented less than acceptable performance, acceptable performance, above acceptable performance, and exceptional performance, with 0, 11, 22 and 33 points assigned to each, respectively, rewarding a better work record as evidenced by the past two annual performance evaluations of the applicants under review.

Mr. Hardin testified that Management also reasoned that if better performance should result in more points for an applicant under the work record portion of the point factor system,

disciplinary actions imposed upon an employee should result in negative scores reducing point totals. According to the point factor system utilized by Management in June, 1988 under Section 28.02, an oral reprimand was to result in a negative five points, a written reprimand was to result in minus 11 points, a suspension of three days or less was to result in the deduction of 22 points; and a suspension of four days or more or a demotion or a termination was to result in the deduction of 33 points.

Mr. Hardin testified that the aforementioned point factoring was done for each of the applicants for the Dodd Hall position and applicants were not considered different for purposes of work record unless their work record point factor totals were different by more than 11 points.

The education category of the point factor system was also to account for a maximum of 33 points. Applicants who had secured an undergraduate degree in a human service area were to receive five points; those who had secured graduate degrees in human service areas were to each receive ten additional points; and additional points were awarded for particular types of coursework, and for licensure as a Licensed Professional Counselor by the Ohio Counselor and Social Worker Board. A difference in point factor system points for the education category totalling more than five points reflected two employees who were not equal in terms of education for purposes of Section 28.02 of the contract.

The experience category of the point factor system assigned five points for each year of experience in vocational

rehabilitation counseling of persons with physical or mental disabilities, to include interviewing, caseload management, vocational analysis, oral and written communication, working with community resources, and utilizing labor market information for job placement purposes. This total was to be no more than 30 points, with one point added for each year served as a vocational rehabilitation counselor within the Rehabilitation Services Commission as a bonus, to a maximum of three bonus points. In order for two applicants for the Dodd Hall position to be considered not equal under this point factor system, for the experience category, there had to be more than 15 points' difference between the two.

The point factor system also mandated that in order for two applicants to be considered not equal, such that seniority was superseded by operation of Section 28.02, the most senior employee and the person selected must be found not equal under the point factor system in two of the three categories of the point factor system, that is, work record, education and experience.

Mr. Hardin then identified Management Exhibit 4 as the worksheet used to calculate the grievant's point total under the point factor system; and identified as Management Exhibit 6 the worksheet of the employee selected for the Dodd Hall position, Randy Williams.

Management Exhibit 4 is the worksheet utilized by Management for determining, under the point factor system utilized in June, 1988, all the points accumulated by the grievant under this process

and the systemic reasons for Ms. Harding's point total. For the category work record, Ms. Harding's 1986 and 1987 annual performance evaluations were averaged and totaled 58 points. As Mr. Hardin explained in his testimony, 58 points falls within the 41 to 60 range which is defined as acceptable performance by the point factor system, producing an 11 point total for work record.

The work record section of the point factor system, however, mandates a penalty for any applicant who had received disciplinary action within the previous two years. The point factor system required a deduction of 22 points for any employee receiving a three day suspension between June, 1986 and June, 1988. The deduction of 22 points from the 11 point total from Ms. Harding's performance evaluations resulted in an assignment of 0 points to Ms. Harding's work record. The point factor system utilized by Management sets a floor of zero for each category. Ms. Harding therefore did not carry over a minus 11 points to other categories.

The education section of Ms. Harding's worksheet, Management Exhibit 4, shows she was awarded five points toward the education point factor total for having secured an undergraduate degree in a human service area, and one educational bonus point for having secured one of 15 specific coursework areas defined by the point factor system. See pages three and four of Management Exhibit 2. Ms. Harding therefore received a total of six points for the education category.

For the experience category, points are awarded by the point factor system for experience defined as experience in vocational

The bargaining unit member selected by Management to fill the Dodd Hall vacancy, Randy Williams, scored work record points based on his 1986 and 1987 performance evaluations which averaged 64 points, placing Mr. Williams within the above acceptable performance range and resulting in 22 points for work record for Mr. Williams. Mr. Williams had not received disciplinary action in the two years previous to the application period for the Dodd Hall vacancy and therefore was assigned a point total of 22 points for work record.

Ms. Harding received 11 points based on performance evaluations which, if not destroyed by the effect of her three day suspension received in September, 1986, would have placed Ms. Harding within 11 points of Mr. Williams's point total for work record and would have therefore been considered equal to Mr. Williams for purposes of the applicants' respective work records.

Had the work record of Ms. Harding under the point factor system produced equality with Mr. Williams, Ms. Harding would also have been equal to Mr. Williams in terms of experience under the point factor system and therefore would not have been considered unequal to Mr. Williams in applying for the Dodd Hall vacancy and would have been selected based on greater seniority.

Experience under the point factor system tops out at six years' service as a vocational rehabilitation counselor, and rewards only three additional points for each years' service provided to the Ohio Rehabilitation Services Commission. Mr. Williams, with eight years' experience as a Vocational

Rehabilitation Counselor and eight years' service as a Rehabilitation Services Commission employee, received the same point total as Ms. Harding who had 15 years' experience in both categories. Had Ms. Harding's 15 years' service with the Rehabilitation Services Commission had greater effect it could have resulted in an inequality found within this category to the benefit of Ms. Harding. Such a circumstance would have nullified the Williams favored inequality in the work record category, by a Harding favored inequality in the experience category.

Education too reflects an inequality by rewarding holders of master's degrees in human service areas with three times the points provided to the holder of an undergraduate degree who also has double digit years of experience. Mr. Williams, due to his master's degree, received three times the points received by Ms. Harding for a degree program, giving rise to a nine point educational inequality between Ms. Harding and Mr. Williams.

The point factor system, utilizing the above rules and point totals, was promulgated formally in 1984. The point factor system applied to Mr. Williams and Ms. Harding for the filling of the Dodd Hall vacancy was developed by a committee of management employees who adapted this point factor system to selection procedures mandated by the collective bargaining agreement between the parties. This committee was composed of Laura Stehura, State Coordinator for Labor Relations; Oliver Hardin, Manager of Human Resources-Personnel; and legal counsel to the Commission. Mr. Hardin explained that the point factor system was established in

September or October, 1986 in order to meet what Management believed to be the requirements of Article 28 of the contract, and specifically the requirements of Section 28.02.

Mr. Hardin explained that in determining who was to be selected for the Dodd Hall vacancy, a list of five applicants was prepared, that being the number of applicants who satisfied minimum qualifications for the vocational counselor rehabilitation series, minimum qualifications appearing on the face of classification specifications for vocational rehabilitation counselors. Mr. Hardin explained that any applicant who did not meet these minimum qualifications was excluded from further consideration for the Dodd Hall vacancy.

Under cross examination Mr. Hardin agreed that the aforementioned point factor system is used only for vocational rehabilitation counselors within the bargaining unit; but pointed out as well that this point factor system had been utilized by Management for all employees prior to the effective date of the collective bargaining agreement. Mr. Hardin also pointed out that this point factor system is still being used for exempt employees within the Commission.

Mr. Hardin, under cross examination, was unable to recall whether the point factor system was used for another District 1199 vocational rehabilitation counselor in October, 1986, Vocational Rehabilitation Counselor Diane Tobias. Mr. Hardin agreed that Section 28.02 of the contract became effective June 12, 1986 and was in effect at the time that Ms. Tobias bid on a vacant

vocational rehabilitation counselor position. It should be noted, however, that Ms. Tobias was then classified and within a position classified Vocational Rehabilitation Counselor 3 and desired to move to a Vocational Rehabilitation Counselor 2 position that had become vacant, without leaving her Vocational Rehabilitation Counselor 3 classification. After some initial reluctance on the part of Management to allow a higher classified employee to move to a lower classified position, the Employer agreed within a settlement, Management Exhibit 1, to upgrade the Vocational Rehabilitation Counselor 2 position to a Vocational Rehabilitation Counselor 3 position, thereby allowing Ms. Tobias to fill the position. The location of this position is specified within the settlement agreement and in consideration for upgrading the position the Union agreed within the settlement to not arbitrate Ms. Tobias's grievance. Both parties within this settlement agreed that the settlement would in no way set a precedent with regard to the way position vacancies are posted or filled within the Rehabilitation Services Commission. The parties also agreed to discuss the issue of posting and filling vacancies further. This settlement is dated October 16, 1986, and is signed by the President of the Union, and the State Coordinator for Labor Relations of the Employer.

The Union contends that the point factor system was not applied to Ms. Tobias but was applied to Ms. Harding and therefore has been selectively utilized. The Union urges that Management's point factor system should not be enforced as to Ms. Harding.

The resolution of Ms. Tobias's grievance did not hinge on operation of the point factor system; it hinged on whether another position could be upgraded. Both Management and the Union in the Tobias matter agreed to resolve the matter not through operation of the point factor system, but through reclassifying the vacant position. There is no issue in the grievance herein related to reclassifying the Dodd Hall position. The arbitrator therefore finds that the Tobias case has no relevance to the issues raised by the subject matter of the arbitration herein.

Also testifying at hearing was Ewart Gregory Pringle, for the past four years an Equal Employment Opportunity Program Supervisor within the Ohio Rehabilitation Services Commission. Mr. Pringle developed the affirmative action plan presently used by the Commission and also investigates discrimination complaints from within the Commission. Mr. Pringle testified that he knew Ms. Harding to be an employee of the Commission and knew of no discrimination complaints filed by her, either internal or external to the Commission, and testified that Ms. Harding had been made aware of her right to file such a complaint with the EEO office of the RSC through information placed periodically in her pay envelope. Mr. Pringle stated that similar information is posted throughout the offices of the Commission.

Mr. Pringle testified that he had reviewed the point factor system used by Management and recommended no change be made under EEO guidelines. Mr. Pringle stated that he is the State EEO Commission liaison on behalf of the Rehabilitation Services

Commission and submitted the Rehabilitation Services Commission's affirmative action plan for approval, a review process which included the point factor system employed by Management under Article 28. Mr. Pringle testified that the State EEO's review did not produce a direction to Management to change the point factor system.

Mr. Pringle testified that he had reviewed the statistics concerning suspensions of employees of different gender and race, Union Exhibit 3, and stated that through his inquiry into these various disciplinary actions found that they were supported by just cause and uniformity of disciplinary action had been maintained.

Under questioning by the Union representative, Mr. Pringle explained that he had not reviewed written reprimands but focused on suspensions, only looked at just cause factors, and did not consider the severity of the discipline imposed for similar levels of misconduct.

Under direct examination by Management's representative, Mr. Pringle pointed out at hearing that he had looked at the point factor system's criteria for assigning points within each of the three categories and found the criteria to be rationally related to the vocational rehabilitation counselor selection process executed by the point factor system.

Edward Davis, presently employed within the Office of County and Deaf of the Bureau of Vocational Rehabilitation within the Rehabilitation Services Commission, testified in rebuttal at hearing that Ms. Harding's actions, related to late authorizations

for reimbursement for services provided under the aegis of the Rehabilitation Services Commission, are not unknown and not infrequent occurrences within the Commission. Mr. Davis, who has ten years' experience with the Rehabilitation Services Commission, testified that he knew there had been frequent occasions when late authorizations had been rectified without recourse to disciplinary action against a vocational rehabilitation counselor. Mr. Davis stated that he was personally familiar with a late authorization on at least one occasion, knew that late authorizations occurred occasionally within his office, and knew of no other vocational rehabilitation counselor who had received a suspension because of late authorizations.

ANALYSIS

The parties agreed that this matter is fully arbitrable and properly before the arbitrator.

Two articles have been proposed by the parties for the purpose of determining this matter. The Union offers two articles within the collective bargaining agreement between the parties which the Union argues support the grievance of Ms. Harding and require the selection of Ms. Harding for the Dodd Hall vacancy rather than a less senior applicant.

Section 26.04 of Article 26 of the collective bargaining agreement between the parties is entitled Shift and Assignment Openings. The section reads:

Shift and assignment openings shall be filled by the qualified employee within the classification at the work site having the greatest state seniority who desires the opening.

The Union urges that the Dodd Hall position and the positions of Ms. Harding and Mr. Williams be considered as within the same work site, as intended by Section 26.04 of Article 26. In support of this argument the Union has offered the decision and award of the undersigned from an arbitration between the Adult Parole Authority of the State of Ohio and the Union. That arbitration referred to parole officers working within assigned geographic areas who spent very little time within the offices of the regional office to which they were assigned. Due to the nature of the regional structure of the table of organization of the Adult Parole Authority used for provision of parole services, the arbitrator in that case found that the work site, for purposes of the parole officer grievants in that matter, should be defined on a regional basis.

The arbitrator herein, however, does not find the nature of the duties performed by the parole officers in the previous arbitration to be analogous to the nature of the duties assigned to the positions under review in this matter. The Dodd Hall position is located on the premises of a university hospital and would appear to present a different vocational practice than that assigned to a metropolitan office within the Commission. The work done by vocational rehabilitation counselors from within positions within the Columbus Metropolitan Office and the work assigned to

the Dodd Hall position are significantly different than the duties carried out within a region of the Adult Parole Authority. It should also be noted that determination of the work site within the previous arbitration was based on a reorganization which Management ordered which shuffled work assignments within entire regions, frequently crossing district lines, but with few exceptions respecting the boundaries of the regions. For that reason and the others cited above, the arbitrator in that arbitration found work site, for purposes of Section 26.04, to be a regional one.

In the matter at hand the arbitrator finds there is sufficient dissimilarity between a Vocational Rehabilitation Counselor 4 position within the Columbus Metropolitan Office of the Rehabilitation Services Commission, and the Vocational Rehabilitation Counselor 4 position located at Dodd Hall, to find that both positions are not at the same work site for purposes of the effect of Section 26.04 of Article 26 of the contract. Both have separate supervisors, both are located apart from one another, and both have caseloads which originate in different client pools. As the positions must be within the same work site for Section 26.04 to apply, the arbitrator finds that Section 26.04 is not applicable to the determination of Ms. Harding's grievance.

The arbitrator finds that Section 28.02, a section within Article 28 of the contract which is entitled "Vacancies", and is entitled Awarding the Job (Transfers and Promotions) is the contract language applicable to this grievance. The Dodd Hall position was to be filled by transfer of the applicant selected by

Management to fill the Dodd Hall position. The language of Section 28.02 reads as follows:

Applications will be considered filed timely if they are received or postmarked no later than the closing date listed on the posting. All timely filed applications shall be reviewed considering the following criteria: qualifications, experience, education and work record. Where applicants' qualifications are relatively equal according to the above criteria, the job shall be awarded to the applicant with the greatest state seniority.

There is no question in this case that Ms. Harding timely filed an application for the Dodd Hall vacancy, as did four other applicants, including Randy Williams. These five applicants also met the minimum qualifications necessary to satisfying minimum requirements appearing on the face of classification specifications for classifications within the vocational rehabilitation counselor series. ~~Having satisfied~~ minimum qualifications, ~~these applicants~~ were then adjudged under a point factor system in terms of experience, education and work record.

There is nothing within Section 28.02 which requires Management, when making the selection to fill the Dodd Hall vacancy, to confer with or seek the agreement of the Union in determining the system under which experience, education and work record were to be assessed for purposes of making a selection. In the event that all applicants were to be determined equal under the system employed by Management for the purpose of adjudging

experience, education and work record, seniority would become the sole criteria in determining the selection and among these five applicants Ms. Harding, the grievant, would have been entitled to a transfer to the Dodd Hall position.¹

As stated previously, there is nothing within the language of Section 28.02 which requires Management to confer with the Union in determining the system under which experience, education and work records are to be considered within the selection process. Article 5 of the collective bargaining agreement between the parties, an article entitled "Management Rights", provides that, except to the extent modified by the language of the collective bargaining agreement, the employer reserves, exclusively, all inherent rights and authority to manage and operate its facilities and programs. Included within the specific language of Article 5 concerning management rights are listed the determination of the Employer's organization and the management of Employer's operations and programs. Also contained within Article 5 is Management's promise that it will carry out its management prerogatives in a way that does not discriminate against any employee in the exercise of contractual rights or for the purpose of invalidating contractual provisions.

¹ The transfer of the grievant to the Dodd Hall vacancy would effect a lateral transfer and result in no change to Ms. Harding's classification, pay level, certification status, seniority or appointing authority.

Article 6 of the contract between the parties binds both the Employer and the Union to prohibiting discrimination against any employee of the bargaining unit on the basis of race or sex.

As Section 28.02 of the contract was the subject of bargaining, and as there is no requirement within this language that the selection process employed by Management be agreed to by the Union, Management is free to construct, within its own discretion, a system to adjudge the experience, education and work record of applicants meeting minimum qualifications for the vocational rehabilitation counselor vacancy at Dodd Hall.

While Management is free to construct its system as it sees fit, that system may not be discriminatory, as that would violate Articles 5 and 6 of the contract between the parties. Since Management is entitled to construct its system, and the system may only be invalidated in the event it is shown to be discriminatory, the burden of persuasion on the issue of whether the point factor system is discriminatory must be borne by the Union, the party raising this allegation.

If the arbitrator were to be persuaded that the system constructed by Management to assess experience, education and work record among applicants for the Dodd Hall position discriminated on the basis of race, sex, age, color, religion, creed, national origin, political affiliation, union affiliation and activity, handicap or sexual preference, such a system would represent a violation of Article 6 of the contract, as well as Article 5. A selection system which violates the contract is by definition

invalid and may not be employed by the arbitrator in determining the proper selection of the applicant under operation of Section 28.02. To violate the contract in order to operate Section 28.02 is a logical inconsistency which can not support a reasonable finding. Thus, the Union is entitled to ask the arbitrator to gauge the system constructed by Management for purposes of operating under Section 28.02, to determine whether it is discriminatory.

It has generally been the case within American judicial pronouncements that systems, whether they be voting systems or school systems or employment systems, are capable of discriminating in different ways. A particular system can make decisions based on whether the applicants are male or female, or white or black, or young or old, and such a system differentiates between individuals through the use of prohibited factors, namely race, sex, etc. Such a system obviously discriminates and clearly violates the anti-discrimination language within the collective bargaining agreement between the parties.

A system can also discriminate by employing procedures which have no rational relationship to the object of the system. In the event a selection system were to be based upon, for example, four monthly examinations on different periods of western civilization, the system would not operate on the basis of race or sex or age, etc., but would rest upon a process that had no reasonable or rational connection to the knowledge, experience and expertise needed by an individual to fill a vocational rehabilitation

counselor position at Dodd Hall. To allow factors which have no reasonable or rational nexus to the object of the system, that is, the selection of an appropriate candidate for transfer, to overcome the impact of seniority, is to ignore the intentions of the language within Section 28.02 and the effect seniority is intended to have in the selection process.

The point factor system used by Management in this matter was developed in September and October, 1986, over one and one-half years prior to the date Ms. Harding filed her application for the Dodd Hall position, in June, 1988. The point factor system does not add or subtract points on the basis of race, sex, age, etc., and therefore does not make choices through utilization of prohibited classifications in making a selection.

The question remains whether the point factor system is reasonably related to the object of the system, that is, to pick the most appropriate candidate. In the event there is no clear leader in this regard, the applicant with the greatest seniority is entitled to the position. This leads to the question of whether the point factor system utilized by Management does in effect, and has in fact, selected the correct candidate for the Dodd Hall position. As there is no question that Mr. Williams has less seniority than Ms. Harding, Mr. Williams must be found to be unequal under the point factor system and superior under the system to Ms. Harding's application to a sufficient degree to warrant his selection over Ms. Harding, the more senior applicant.

The point factor system prepared by Management addresses the three categories listed within Section 28.02 which are to be considered only after minimum qualifications have been satisfied. The point factor system employed by Management does have a section on experience, does have a section on education, and does have section on work record.

The point factor system provides 33 points to each of the three categories, thereby making each equally important in determining the equality or inequality of applicants. This means that even if there is great inequality in one of the three categories, this singular inequality does not affect considerations in the other two categories. It is also the case that in order to be treated as unequal under this system an unequal applicant must be unequal in two of the three categories, not just one.

The work record part of Management's point factor system sets out four levels of performance based on points averaged within performance evaluations issued during the two most recent annual evaluation periods. Points are assigned in ascending order for point total levels within this category, assigning more points to higher levels of performance as reflected by averaged performance evaluation totals.

Whether or not Ms. Harding's performance evaluations should have been higher, if her performance evaluations are averaged and compared to Mr. Williams's performance evaluations over the same time period, the operation of the point factor system finds, for purposes of work record, that Ms. Harding and Mr. Williams are

equal. Even though Ms. Harding's point total is less than Mr. Williams's, more than an 11 point difference is required to find the applicants unequal for purposes of work record, and that is not the case in comparing Ms. Harding's work performance evaluations to those of Mr. Williams.

The reason that Mr. Williams was held unequal to Ms. Harding was due to the three day suspension directed to Ms. Harding in September, 1986. While the allegations of wrongdoing within the suspension refer to actions in May and June, 1986, the suspension itself was not issued to Ms. Harding until September, 1986.

The point factor system takes into consideration, for purposes of adjudging work record, disciplinary action received within the two years previous to the selection process. Ms. Harding's three day suspension issued in September, 1986 is within two years of the selection process and resulted in the deduction of 22 points from the points she accumulated on the basis of averaging her two most recent annual performance evaluations.

It could be argued that the three day suspension is almost more than two years prior to the selection process and should not be granted the weight, on its own, to nullify the selection of Ms. Harding. It could be argued that to provide this type of weight to a three day suspension for activity which is not unknown among RSC vocational rehabilitation counselors is to impose too severe a punishment for this single episode of disciplinary action, a single smudge on a record of seventeen years' service to the Employer and RSC clients.

It should be remembered, however, that the arbitrator has not been employed to determine whether the three day suspension should have been imposed. The issue before the arbitrator herein is not a disciplinary matter, and the arbitrator has no grant of arbitral authority in this matter to question the enforcement of the three day suspension issued to Ms. Harding in September, 1986. If the suspension itself is not subject to review by the arbitrator, if the suspension is a given within the facts of this matter, the suspension must be considered under operation of the point factor system as the discipline occurred within two years previous to the selection process. The arbitrator is of the view that prior discipline within a relatively short period of time prior to a selection process is reasonably related to determining the most appropriate candidate for a vacancy. This is not to judge whether Ms. Harding's conduct in early 1986 warranted a three day suspension. But prior disciplinary action does have a connection to the object of the system and therefore the arbitrator declines to ignore the effect of the deductions for prior disciplinary action visited upon Ms. Harding under the point factor system. While it is arguable whether a three day suspension almost two years prior to the selection process deserves a negative 22 points, this is a judgment for the makers of this point factor system, and the arbitrator declines to interpose his views on this aspect of point factoring. The grant of authority to Management in devising this system under Section 28.02 and Article 5 of the collective bargaining agreement, appears to the arbitrator to allow Management

to make this kind of analytical decision at this level of the system. This decision weights greatly the negative value of prior discipline within the recent past; and the arbitrator declines to find that such a judgment is inconsistent with the contract between the parties. This aspect of the system does not discriminate through a prohibited classification such as race, sex, age, etc., and is rationally related to the object of the selection process, the selection of an appropriate candidate.

The arbitrator therefore finds that the operation of the work record category of Management's point factor system is not discriminatory and is enforceable under the contract between the parties.

As to education, Management has provided great weight to an advanced graduate degree. A master's degree in a human services area is given three times the points of a bachelor's degree. Mr. Williams's master's degree produces inequality on its own. It could be argued that the master's degree points are excessive in their effect relative to bachelor's degree points, but the arbitrator finds that educational attainment is reasonably related to the goal of the selection process, is non-discriminatory by race, sex, age, etc., and Management is entitled to assess this factor under its own conclusions about how educational degrees are to be weighted.

The experience category examines years of service and gives added weight to years of service provided to the Rehabilitation Services Commission. However, it only awards points for experience

for the first six years and does not recognize more than six years' experience, with the exception of an additional three points based on the first three years of service to the Rehabilitation Services Commission. Any general experience over six years, and any years of service provided to the Rehabilitation Services Commission beyond three years do not impact the determination of equality or inequality within the experience category. It could be argued that such a system dilutes the effect of lengthy seniority. It could be argued that Ms. Harding's greater experience entitles her to an inequality finding for the experience category rather than the equality finding which resulted from the operation of this system by Management. The arbitrator, however, does not find that the procedures employed by Management within its point factor system are so unreasonable as to support a finding that they are discriminatory as being unrelated to the object of the selection process. Being unpersuaded to this contention, the arbitrator finds that the equality of the experience between Mr. Williams and Ms. Harding under the point factor system is not discriminatory.

The arbitrator therefore finds that the point factor system used by Management in operation of Section 28.02, for selecting an applicant for the Dodd Hall position, was not discriminatory for work record, experience or education and therefore does not violate Articles 5 and 6 of the contract between the parties. As this system is non-discriminatory, it is entitled to be used by Management in operating Section 28.02 and selecting an applicant for the Dodd Hall vacancy.

The arbitrator notes that his finding that the point factor system is non-discriminatory does not mean that the arbitrator has passed judgment on the wisdom of this system. If the system is non-discriminatory the merit of the system is not a subject which the arbitrator is entitled to review. Management, under the language of the contract between the parties, is authorized to construct a non-discriminatory selection system in order to operate Section 28.02, and non-discrimination is the extent of its obligation to the Union and the bargaining unit members under the contract. As the arbitrator finds that the point factor system constructed by Management is non-discriminatory, Ms. Harding is entitled to have her work record, experience and education adjudged under the system in the same way that all other applicants are adjudged.

The evidence discloses that Ms. Harding's years of service, performance evaluations, disciplinary record and educational attainment were examined under the point factor system in the same way that these factors were applied to all other applicants. The operation of this system, based on the selection factors of the five applicants for the Dodd Hall position, produced the selection of Mr. Williams, a less senior bargaining unit member than Ms. Harding. Section 28.02 permits seniority to be overcome in selecting an applicant for a vacancy and awarding a job through a transfer as long as the selection is non-discriminatory and otherwise does not violate the language of the contract. In this matter Management constructed a non-discriminatory system, operated

it uniformly as to all applicants, and lived up to its obligations under the collective bargaining agreement between the parties.

AWARD

The grievance is denied.


Howard D. Silver
Arbitrator

October 4, 1989
Columbus, Ohio