

Howard D. Silver
Arbitrator
Columbus, Ohio

In the Matter of Arbitration
Between

Case No.
16-00-890525-0050-02-12

The State of Ohio

Grievant: Myer J. Bornstein

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

Egdilio J. Morales, Advocate
Office of Collective Bargaining

Louis Kitchen, Management Representative
Office of Collective Bargaining

Terry Piwnicki, Management Representative
Department of Human Services

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

Cheryl Hill, Advocate
Ohio Health Care Employees Union,
District 1199

Tommie L. Suber, Delegate
Ohio Health Care Employees Union,
District 1199

ISSUE

Did Management deny the Grievant, Myer Bornstein, the position of Social Program Developer in violation of the contract?

The hearing in this matter was held on May 3, 1990 at 10:00 a.m. 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 May 3, 1990.

STATEMENT OF THE CASE

The Grievant, Myer Bornstein, began his public employment with the State of Ohio within the Ohio Rehabilitation Services Commission as a Rehabilitation Counselor. This employment began in June, 1972 and extended through September, 1980. From the fall of 1980 until the fall of 1985, Mr. Bornstein worked in the private sector as a photographer. From October, 1985 through April, 1986, Mr. Bornstein again served as a Rehabilitation Counselor with the Ohio Rehabilitation Services Commission.

In January, 1987, Mr. Bornstein accepted an interim position with the Governor of Ohio's Office of Advocacy for Disabled

Persons. This interim position lasted until April, 1987, at which time Mr. Bornstein returned to the profession of photography.

In March, 1988, Mr. Bornstein accepted a position with the Ohio Department of Human Services. This employment resulted from an interim appointment authorized for eighteen months. Mr. Bornstein's interim position was located within the Ohio Department of Human Services's Bureau of Developmental Disability Services, and Mr. Bornstein served therein as a Rehabilitation Program Specialist.

Toward the end of Mr. Bornstein's interim appointment, which was to conclude in September, 1989, it became necessary that Mr. Bornstein locate another position within the Ohio Department of Human Services or his employment would terminate at the conclusion of the interim appointment. Within the Ohio Department of Human Services at that time were a number of positions upon which Mr. Bornstein bid. Among the positions upon which Mr. Bornstein bid in February or March, 1988, was a position located within the Division of Long Term Care, at the division level. Mr. Bornstein explained at hearing that he applied for this position because it would allow him to work on the quality of care received by individuals in nursing homes, a subject area of great concern to Mr. Bornstein. Mr. Bornstein explained that he desired to make a career in the area of work addressed by this position, and said that this position would have allowed Mr. Bornstein to perform his duties with much less driving than had been the case in his interim position. Mr. Bornstein's bid upon the Division of Long Term Care

position was denied by Management in April, 1989, and an applicant from outside the Grievant's bargaining unit was selected for and installed within this position. It was as a result of this denial that the grievance in this matter was filed.

It should be noted that the position located within the Division of Long Term Care upon which Mr. Bornstein bid, the position which was denied to him and within which an employee outside the bargaining unit was installed, was a position classified differently than Mr. Bornstein's interim position. The position bid upon by Mr. Bornstein was assigned a pay range lower than the pay range assigned to Mr. Bornstein's position during the eighteen month interim period. Thus, by bidding on the position within the Division of Long Term Care, Mr. Bornstein had requested that he be moved from a position with a higher classification and pay level, to a position with a lower classification and pay level.

POSITIONS OF THE PARTIES

Position of the Union

The Union contends that Article 28 of the collective bargaining agreement between the parties entitles Mr. Bornstein to priority in bidding on the position which was denied him and which was ultimately granted to a person outside the bargaining unit at the time of the selection process. The Union contends that to deny Mr. Bornstein this requested position in favor of a non-bargaining

unit employee, violates Article 28 of the collective bargaining agreement between the parties.

In support of its argument the Union points to Section 28.02 of Article 28 of the collective bargaining agreement between the parties, a section entitled, Awarding the Job (Transfers and Promotions). The Union points out that the first paragraph of this section holds that where applicants' qualifications are relatively equal according to qualifications, experience, education, and work record, the job shall be awarded to the applicant with the greatest state seniority. The Union also points out that within Section 28.02 of this article is a sequential listing of how positions are to be filled. This prioritizing list reads, from highest priority to lowest priority: awarding the job to an applicant working at the facility where the vacancy exists; awarding the job to an applicant working in the agency where the vacancy exists; awarding the job to an applicant working in the bargaining unit; awarding the job by hiring a new employee. The Union contends that as Mr. Bornstein was within the bargaining unit at the time the position selection was made, he was entitled to a selection preference over an applicant not within the bargaining unit. As Mr. Bornstein was not accorded this priority, the Union claims that Management has violated Section 28.02 of Article 28 in making the selection it did.

The Union requests that the position at issue upon which Mr. Bornstein bid in early 1989, located within the Division of Long

Term Care, be vacated by its present incumbent, and Mr. Bornstein be installed within it.

Position of Management

Management argues that the bid by Mr. Bornstein giving rise to this grievance did not constitute a request for a transfer or promotion, and therefore does not fall under the requirements of Section 28.02 of Article 28. Management claims that Mr. Bornstein presented Management with a request for voluntary demotion, as he wished to move from a position bearing a higher pay range to a position bearing a lower pay range. Management urges that Section 28.02 of Article 28 was never intended to confer rights of priority upon an employee who has made a request for a voluntary demotion.

Management contends that demotion is only mentioned in one article of the agreement, Article 8, an article addressing disciplinary action; is nowhere found within any other article of the collective bargaining agreement between the parties; and is totally absent from Article 28, including Section 28.02 of Article 28. As Article 28 has no application to Mr. Bornstein's bid on the position in question, argues Management, there has been no violation of the contract in the selection of the incumbent for the position in question, and Mr. Bornstein's grievance should be denied in its entirety.

ANALYSIS

Article 28, within its first two sections, describes procedures associated with bidding on a vacant position and making a selection for a vacant position. Section 28.01 of Article 28 confers rights upon bargaining unit members concerning filing official requests to fill vacant positions. The first two paragraphs of Section 28.01 of Article 28 read as follows:

A vacancy is defined as a full or part-time position in the bargaining unit which the agency has determined is necessary to fill.

When a vacancy is created by an incumbent employee leaving the position, and that incumbent is above the entry level position in the classification series, the job shall be posted at the level in the classification series of the leaving employee, provided the duties and responsibilities remain the same. After the employees have had the opportunity to bid for lateral transfers or for promotions, the position can be reduced in the classification series.

The language contained within the second paragraph of Section 28.01 of Article 28 specifically empowers employees to file bids for lateral transfers or promotions. These two species of movement from one position to another, lateral transfers and promotions, denote movement either on a horizontal plane or upward to a higher position and pay level. Movement from a higher position to a lower position is nowhere mentioned within this paragraph and therefore the arbitrator finds that Section 28.01 does not address

opportunities to bid on downward transfers, also known as voluntary demotions. While the language of Section 28.01 does not prohibit a bid on a lower position, the language therein does not signal that such a downward bid is addressed by this section, revealing no intention by the parties who negotiated the language of Section 28.01 that this contractual provision was to affect bids on lower positions. Without such an agreed intention, the arbitrator has no authority to apply Section 28.01 to Mr. Bornstein's bid.

Because Section 28.01 does not apply to Mr. Bornstein's bid there is a real question about whether such a bid would trigger mechanisms contained within Section 28.02. While there is no question that lateral transfers and promotional bids arising under Section 28.01 bring into play selection mandates found within Section 28.02, voluntary demotions are not mentioned within the language of Section 28.01 and it is therefore difficult to conclude that such a bid was intended by the parties to trigger the selection requirements found within Section 28.02.

While Section 28.01 refers to bidding privileges granted to bargaining unit members, Section 28.02 sets out selection obligations imposed upon Management in making a selection for a position upon which bids were received. The arbitrator finds that such obligations are triggered by bids received under Section 28.01. As stated above, if a bid not sanctioned by Section 28.01 is received, it is difficult to conclude that Section 28.02 is triggered. However, the Union contends in this matter that Section 28.02 is applicable to the bid filed by Mr. Bornstein in his

attempt to secure a voluntary demotion to the position in question. Because of this contention, and in an effort to meet all of the arguments made in this proceeding, the arbitrator shall consider Section 28.02, assuming arguendo that Mr. Bornstein's request for a voluntary demotion, though not countenanced by Section 28.01, nonetheless triggers the effects of Section 28.02.

Section 28.02 of Article 28 of the collective bargaining agreement between the parties reads as follows:

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.

Section 28.02 refers specifically to selecting applicants for positions among transfers and promotions. There is no dispute that Mr. Bornstein's bid did not present a request for a promotion as it did not request a movement from a lower classification and pay range to a higher classification and pay range. Thus, if Mr. Bornstein's grievance is to be granted under Section 28.02, it must fall under the term "transfers".

The Union contends that the term "transfers", as used within Section 28.02 of Article 28, intends any movement from one position to another, and would include a voluntary demotion from a higher position to a lower position, as was the case with Mr. Bornstein's bid. The Union points out that as the term "transfer" is nowhere defined within the collective bargaining agreement between the parties, and as the term "transfer" does not appear within Ohio Administrative Code nomenclature, Mr. Bornstein's request to move from his position during the interim appointment period to another position constitutes a transfer and therefore triggers the selection obligations upon Management imposed by Section 28.02.

In response to the Union's claim, Management points to definitions of terms contained within Ohio Administrative Code provision 123:1-47-01. Paragraphs 43 and 44 of this provision define "inter-transfer" and "intra-transfer".

Ohio Revised Code Section 4117.10(A) provides that where no agreement exists or where an agreement makes no specification about a matter, the public employer and public employees are subject to all applicable state or local laws or ordinances pertaining to the

wages, hours, and terms and conditions of employment for public employees. The significance of this statutory provision to this matter is that in the event an agreement is silent on a particular subject, Ohio law fills the void. With this as authority, Management contends that the definitions contained within the Ohio Administrative Code as to "inter-transfers" and "intra-transfers", as well as the definition of "demotion", which can be found in paragraph 28 of the aforementioned Ohio Administrative Code provision, provide definitions which exclude Mr. Bornstein's voluntary demotion from the transfers mentioned within Section 28.02.

It is not clear that the term "transfers" used within Section 28.02 may be defined by terms which are slightly different than the term to be defined. The word "transfers" is used within Section 28.02, but the Ohio Administrative Code definitions cited by Management refer to "inter-transfers" and "intra-transfers". The arbitrator finds, however, that deciding this particular issue is unnecessary because even without the definitions contained within the Ohio Administrative Code provisions cited above, it can be concluded that the term "transfers" as used within Section 28.02 does not include voluntary demotions. This view is based on three reasons.

First, it is no coincidence that Section 28.01 within its second paragraph refers to transfers and promotions, and the same terminology is used within Section 28.02. The language contained within Section 28.01 describes the types of bids which trigger the

selection obligations found within Section 28.02. Thus, it is reasonable to conclude that the transfers intended by Section 28.02 are the lateral transfers expressly mentioned within Section 28.01.

A second reason that the term "transfers" within Section 28.02 does not include voluntary demotions is based on the fact that movements from position to position can occur in only three ways; the movement can move from a lower classification to a higher classification thereby giving rise to a promotion; the change can move from a pay range to a similar pay range, a movement that does not change the pay range of an employee and therefore constitutes a lateral movement; or the change can move from a higher pay range to a lower pay range, and if done voluntarily, constitutes a voluntary demotion. Section 28.02 expressly mentions two of the three types of movements possible and specifically omits one of these three. It is clear that the term "transfers" in Section 28.02 does not include movement from a present position to a higher position as Section 28.02 expressly uses the term "promotions". Thus, the term "transfers" is not intended to include all three types of movements, as it does not include promotions.

The arbitrator finds that as the term "transfers" in Section 28.02 does not include all three types of movement, and as movement to a higher position is expressly noted, if the parties intended to include voluntary demotions, movement to a lower position, this type of movement would also be expressly noted, along with the terms "transfers" and "promotions". Because no mention of any kind of demotion is included within the language of Section 28.02, while

"promotions" and "transfers" are expressly included, the arbitrator concludes that movement downward as a result of a bid is not a subject addressed by Section 28.02.

The third reason upon which the arbitrator bases his decision that Section 28.02 is not applicable to Mr. Bornstein's bid involves the intentions of the parties, namely the Employer and the Union, when the parties negotiated the language of Section 28.02. The arbitrator's job in this case is to implement what was agreed by the parties when they constructed the contractual language in question. It is not the job of the arbitrator, and the arbitrator has no authority, to add something to the agreement reached by the parties not intended by the parties.

There was no evidence presented indicating that in the negotiations of the parties, during the construction of Section 28.02, that voluntary demotions were to be included in the operation of this section. The arbitrator takes notice of the fact that is uncommon to find employees pursuing positions paying less than their present positions. Employees, whether inside or outside of bargaining units, don't usually take affirmative action in order to make less money for the work that they perform. While voluntary demotions obviously do occur, as evidenced by Mr. Bornstein's particular circumstances and his attempt to secure continuing employment with the Ohio Department of Human Services, such a circumstance is not common and would therefore not normally be a topic of collective bargaining because of its rarity. The arbitrator thinks it doubtful that when Section 28.02 was being

bargained by the parties, a discussion occurred about how to treat those employees desiring positions of employment at levels lower than their present positions. The record does not reflect such a discussion, and without such evidence the arbitrator cannot find that such a negotiation occurred. Without such a discussion no agreement can be found, and without such an agreement no intentions about demotions under Article 28 can be implemented by the arbitrator.

There is nothing in the record of this matter to indicate that the parties discussed, negotiated, or agreed upon how to handle bids from employees requesting demotions. It is only under such an agreement that Mr. Bornstein's claim, that his request for a voluntary demotion triggered the privileges claimed under Article 28 of the collective bargaining agreement between the parties, can be honored. The arbitrator does not find such an agreement between the parties and therefore concludes that by denying Mr. Bornstein's bid and selecting a non-bargaining unit member for the position in question, Management did not violate its obligations under the contract. Accordingly, the grievance is denied.

AWARD

1. Management did not deny the Grievant, Myer Bornstein, the position of Social Program Developer in violation of the contract.
2. The grievance is denied.

A handwritten signature in cursive script, reading "Howard D. Silver". The signature is written in dark ink and is positioned above a horizontal line.

Howard D. Silver
Arbitrator

May 23, 1990
Columbus, Ohio