

Howard D. Silver
Arbitrator
Columbus, Ohio

In the Matter of Arbitration
Between

Class Grievance

The State of Ohio

Representative Grievant:
Crystal J. Ulery

and

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

Case No.
29-02(01-02-89)115-02-12

APPEARANCES

For The State of Ohio

John Connelly, Advocate
Rehabilitation Services Commission

Darla J. Burns, Advocate
Rehabilitation Services Commission

Don Wilson, Management Representative
Office of Collective Bargaining

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

Kathleen Kraemer, Advocate
Ohio Health Care Employees Union,
District 1199

Jean Pretzlav, Delegate
Ohio Health Care Employees Union,
District 1199

ISSUE

Did the agency violate the contract when it reassigned a Vocational Rehabilitation Counselor to the Parma City School System? If so, what is the remedy?

The hearing in this matter was held on May 9, 1990 at 10:00 a.m. on the fifteenth Floor, 65 East State Street, Columbus, Ohio, within the offices of the Ohio Department of Administrative Services's Office of Collective Bargaining. 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 9, 1990.

STATEMENT OF THE CASE

This matter arises from the filing of a class grievance on January 19, 1989. Named grievants are twenty-four Vocational Rehabilitation Counselors employed by the Ohio Rehabilitation Services Commission. The representative grievant who filed the grievance on behalf of the class is Crystal J. Ulery.

Prior to January 19, 1989, Randy F. Davis, a Vocational Rehabilitation Counselor 2 employed by the Ohio Rehabilitation Services Commission, was within a position located at the Veterans Administration Hospital in Cleveland, Ohio. In January, 1989, the

Ohio Rehabilitation Services Commission relocated Mr. Davis from the Veterans Administration Hospital to a position within the Parma City School System. Mr. Davis, as a result of this move, filled the first and only full-time Vocational Rehabilitation Counselor position assigned to the Parma City School System.

The caseload formerly handled by Mr. Davis at the Veterans Administration Hospital was reassigned to Patricia Miles, on a liaison basis. Liaison status means that Ms. Miles is to assist clients at the Veterans Administration Hospital on an as needed basis, and the permanent position formerly assigned full-time to the Veterans Administration Hospital, when filled by Mr. Davis, was no longer utilized. Ms. Miles did not grieve the assignment of the Veterans Administration Hospital liaison caseload to her position.

As a result of the organizational change involving the movement of Mr. Davis from a full-time Vocational Rehabilitation Counselor position at the V.A. Hospital to a full-time Vocational Rehabilitation Counselor position with the Parma City Schools, the sum total of Vocational Rehabilitation Counselors in the Cleveland area neither increased nor decreased. Prior to Mr. Davis's assignment as a full-time Vocational Rehabilitation Counselor with the Parma City School System there had been no full-time Vocational Rehabilitation Counselor serving the Parma City School System. The Vocational Rehabilitation Counselor position filled by Mr. Davis with the Parma City School System is located at Valley Forge School, Parma Heights, Ohio. This position is supervised by James Grieve, a Vocational Rehabilitation Supervisor.

Both the Veterans Administration Hospital position in which Mr. Davis worked prior to January, 1989, and the position to which Mr. Davis moved, located with the Parma City School System, are located within area seven of the Rehabilitation Services Commission's Bureau of Vocational Rehabilitation. Area seven of the Bureau of Vocational Rehabilitation is comprised of ten rehabilitation teams. Area seven's ten rehabilitation teams are located within five rehabilitation groups, with the Parma City School System caseload located within group four, and the Cleveland Veterans Administration Hospital caseload located within group two.

Each caseload within the Bureau of Vocational Rehabilitation is identified by a rehabilitation service team (RST) number. An RST number is composed of four digits, the first three of which represent the area, group, and team, respectively, to which the caseload is assigned. The fourth digit within the RST number identifies an individual counselor.

The grievants allege within their grievance that in January, 1989, the position to which Mr. Davis moved within the Parma City School System was not properly posted as a new position by Management. Within that grievance, Articles 1, 28.01, 28.02, 27.01, 27.02, and 26.05 were claimed by the grievants to have been violated. At step three of the grievance procedure, the grievants withdrew allegations about Article 26.05. The grievance in this matter was filed directly at step three of the grievance procedure authorized by the collective bargaining agreement between the parties.

TESTIMONY OF WITNESSES

Joan Pretzlav

The first witness called by the Union was Joan Pretzlav, a ten year employee of the Rehabilitation Services Commission, and for the past three years an Employer Services Specialist serving in Rocky River, Ohio. Ms. Pretzlav is a Union delegate and assisted in the filing of the grievance giving rise to this arbitration.

Ms. Pretzlav testified that the position created and assigned to the Parma City School System in January, 1989, was a position in which many rehabilitation counselors, including Rehabilitation Services Counselors 1, 2, 3, and 4, were interested. She stated that while twenty-four Rehabilitation Service Counselors signed the grievance complaining of the lack of posting of this position, other employees of the Commission were interested in the position as well, beyond the twenty-four grievance signatories.

Ms. Pretzlav testified that two people who might have expressed interest in the Parma City School System position did not sign the grievance for fear that in the event the position were to be bid and filled on the basis of seniority, Mr. Davis would risk being laid off.

Under cross-examination Ms. Pretzlav agreed that any mention of the layoff of Mr. Davis was strictly verbal and she had seen nothing on this subject in writing. She explained that mention of the possible layoff of Mr. Davis had come from Vocational Rehabilitation Supervisor James Grieve.

Crystal J. Ulery

The next witness called by the Union to testify in this matter was Crystal J. Ulery, a Vocational Rehabilitation Counselor 3 employed at the Brecksville Veterans Administration Hospital. Ms. Ulery has provided services to the Rehabilitation Services Commission for over fifteen years, was last hired by the Commission in 1976, and presently serves as a Union delegate.

Ms. Ulery testified that she received a number of inquiries from rehabilitation counselors about the position filled by Mr. Davis with the Parma City Schools. Ms. Ulery explained that to many rehabilitation counselors the Parma City School position represents a very attractive caseload because of the assistance which is available to it, assistance which serves to increase the chances of successfully rehabilitating the clients who make up the caseload. Ms. Ulery pointed out that a caseload at a Veterans Administration Hospital may include clients who are drug or alcohol dependent, or under severe psychiatric or physical disabilities, or homeless. Ms. Ulery explained that the obstacles inherent in such a caseload are much more formidable than those which would be expected within a caseload associated with the Parma City School System.

Ms. Ulery explained that the positions filled by Mr. Davis, both at the V.A. Hospital and with the Parma City School System, had attached to them position control numbers. These position control numbers were constructed through putting together digits designating area, group, and assignment of the position to an

office. Ms. Ulery explained that the first digit of each position control number designates the area to which the position is assigned; the second digit denotes the group within the area to which the position is assigned; and the remaining digits are position specific, denoting the singular position to which they attach. In this regard Ms. Ulery pointed to Union Exhibit 1, a vacancy notice which reflects a position control number of 72000.0. Ms. Ulery explained that within this position control number the first digit, seven, refers to area seven, while the second digit refers to group two within area seven.

Ms. Ulery explained that area seven contains five groups, with the following digits assigned to each: 1. Amherst-Rocky River; 2. Cleveland Hearing and Speech and Cleveland East Office; 3. Mental health groups; 4. Mid-town and independent groups; and 5. Metro groups in Cleveland, Ohio.

The parties agreed that the position filled by Mr. Davis while located at the Cleveland Veterans Administration Hospital was designated 72017.0, while the position filled by Mr. Davis with the Parma City School System was designated 74006.0. As stated by Ms. Ulery, the Cleveland Veterans Administration Hospital position was a position in area seven assigned to group two, the Cleveland Hearing and Speech and Cleveland East Office group; the Parma City School Position is located in area seven but is assigned to group four, the Mid-town and independents group.

Under cross-examination Ms. Ulery stated that the Cleveland Veterans Administration Hospital is physically separate from the

Brecksville Veterans Administration Hospital, but explained that both medical centers are jointly administered. Ms. Ulery also agreed that the movement of Mr. Davis to the Parma City School System did not replace another employee, but did remove the need for a liaison position formerly assigned to the Parma City School System.

Mary R. Warr

The first witness called to testify by Management was Mary R. Warr. Ms. Warr has served as Area Manager of the Bureau of Vocational Rehabilitation's area seven for the past eleven years. Ms. Warr explained that area seven covers Cuyahoga and Lorain Counties, and said she is responsible for all fiscal, operational, and organizational activities within area seven. Included within this authority, explained Ms. Warr, is the power to reassign area seven employees.

Ms. Warr explained that the Bureau of Vocational Rehabilitation works with disabled clients if the handicap suffered presents an obstacle to employment. The services provided by the Bureau of Vocational Rehabilitation are intended to increase the employability of clients, as well as to assist them in living as independently as possible. Ms. Warr explained that a Rehabilitation Counselor assesses the disability of a client and then works with the client to reach vocational, employment, and independent living goals.

Ms. Warr explained that the Rehabilitation Services Commission has had a long term relationship with the Parma City Schools. Ms. Warr testified that originally this relationship was carried out through a liaison position assigned to the Bureau's Independence office, a position intended to serve clients from the Parma City Schools referred to the liaison counselor. Ms. Warr testified that in January, 1989, a full-time position was assigned to the Parma City Schools and the liaison position assigned to the school system was deleted. Ms. Warr testified that this organizational change arose from discussions originating in March, 1988 about problems arising from the services provided to referrals through the liaison position. In this regard Ms. Warr identified State's Exhibits 1 through 5 which are memoranda, correspondence, and minutes of meetings leading up to the assignment of a full-time position to the Parma City School System.

Ms. Warr testified that there were also problems at the Cleveland V.A. Hospital in the form of a reduction in the number of appropriate referrals. Ms. Warr testified that because of the increased need of the Parma City School System for a full-time counselor position, along with a decreased need for a full-time position at the Cleveland V.A. Hospital, Management determined to reassign the Cleveland V.A. Hospital position to the Parma City School System. Ms. Warr testified that when this reassignment occurred it moved Mr. Davis and his position from the Cleveland V.A. Hospital to the Parma City School System. She stated that Mr. Davis was pleased with the move, and pointed out his position's

classification remained the same and its location remained in Cuyahoga County. Ms. Warr testified that the caseload formerly served by Mr. Davis at the Cleveland V.A. Hospital was assigned to a liaison position permanently assigned to the Cleveland Metro Office. Ms. Warr pointed out that the movement of Mr. Davis and Mr. Davis's position to the Parma City School System resulted in no change to the number of counselors within area seven.

Ms. Warr explained that prior to Mr. Davis moving to the Parma City School System, the Parma City School System had never been served by a full-time Rehabilitation Counselor position, but had been served only by a liaison position. Ms. Warr further testified that at the time of hearing the liaison position assigned to the Cleveland V.A. Hospital handled approximately fifty referrals, while Mr. Davis, at the time of hearing, served approximately one hundred fifty referrals through the Parma City School System. Ms. Warr pointed out that a similar situation had occurred in the past when a position within area seven's group four had been reassigned to the Cuyahoga East Vocational Education Consortium.

Under cross-examination Ms. Warr testified that the liaison counselor assigned to the Cleveland V.A. Hospital in January, 1989 had been the liaison counselor formerly assigned to the Parma City School System. Ms. Warr also explained that there are two counselors assigned to the Brecksville V.A. Hospital and a single counselor assigned to the Cleveland V.A. Hospital. When asked why the movement of a position from a V.A. hospital was not effected from the Brecksville Medical Center, Ms. Warr responded that it was

the judgment of Management that the Brecksville V.A. Hospital had a greater likelihood of generating more appropriate referrals. Ms. Warr testified that the ideal caseload for a Rehabilitation Counselor, in her opinion, is about one hundred fifteen. She stated that caseloads vary depending on location.

Under redirect examination Ms. Warr testified that the Parma City School System caseload had increased in recent times and the relationship between the Bureau of Vocational Rehabilitation and the Parma City School System had strengthened recently. She stated that she had received no complaints about not having a full-time position assigned to the Cleveland V.A. Hospital.

Bruce Mrofka

The next witness called by Management was Bruce Mrofka, the Manager of Human Resources and Labor Relations for the Rehabilitation Services Commission. Mr. Mrofka has served in this role for three and one-half years. Mr. Mrofka, among other duties, serves as a step three grievance officer and served as the step three grievance officer in the grievance herein. Mr. Mrofka expressed the opinion that the movement of the position filled by Mr. Davis from the Cleveland V.A. Hospital to the Parma City School System represented a job reassignment, a job action not covered by the collective bargaining agreement between the parties and therefore a job action controlled by Ohio law.

POSITIONS OF THE PARTIES

Position of the Union

The Union agrees that under the collective bargaining agreement between the parties Management has the right to determine the location of positions within its table of organization. The Union points out, however, that when a position is created, such as the position created with the Parma City School System, Article 28 of the collective bargaining agreement between the parties controls how the position is to be filled. The Union stresses that the Parma City School System's full-time Rehabilitation Counselor position did not exist prior to January, 1989; was a position that Management determined was necessary to fill; and therefore should have been filled under the agreed rights and obligations expressed within Article 28 of the contract.

The Union contends that Article 28 requires that for vacant positions of the type created within the Parma City School System in January, 1989, counselors within the bargaining unit to which the position is assigned must be afforded the right to bid upon the position. The Union argues that not only is this bidding right required in order to afford the grievants herein their contractual rights, but claims as well that implementation of the language of Article 28 in the selection of an incumbent for the position in question protects the integrity of the bargaining unit and prohibits Management from manipulating the movement of positions in order to avoid the letter and spirit of the privileges, rights,

and obligations found within Article 28. The Union therefore urges that the arbitrator order that the position filled by Mr. Davis with the Parma City School System be opened to bids by eligible bargaining unit members, that provisions of Article 28 be utilized in determining the selection of an employee for the position, and that the employee appropriately selected under Article 28 be installed within the position.

Position of Management

Management argues that there has been no vacant position to fill in the circumstances addressed by this grievance. Management argues that the movement of Mr. Davis's position from the V.A. Hospital in Cleveland to the Parma City School System was a job reassignment, a job action not addressed by the collective bargaining agreement between the parties and therefore a situation which cannot be resolved under contractual language.

The Employer points to Ohio Revised Code Section 4117.10(A) which 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 points to Ohio Administrative Code provision 123:1-25-01(H), a rule promulgated

by the Division of Personnel of the Ohio Department of Administrative Services.

Ohio Administrative Code provision 123:1-25-01(H) holds, among other things, that the word "transfer", as used in rule 123:1-25-01, shall not include any job reassignment within the same classification, within the same appointing authority, which takes place in and involves a reassignment to a job location in the same county. The Employer points out that the movement of Mr. Davis's position and Mr. Davis resulted in both remaining in the same county, serving the same appointing authority, under the same classification title. Management argues that this circumstance reflects that the movement of Mr. Davis's position and Mr. Davis does not represent a transfer as defined by Ohio law, but rather represents a job reassignment. The Employer claims that as job reassignments are not addressed by Article 28 or any other article within the collective bargaining agreement between the parties, the position filled by Mr. Davis with the Parma City School System was not a position subject to bid and was moved by Management in a way which does not violate in any way the collective bargaining agreement between the parties. Management argues that as job reassignments are not addressed by the contract between the parties, the issue raised about the job reassignment involving Mr. Davis and his position is not arbitrable.

In support of its view Management presented an arbitral opinion and award by Arbitrator James A. Doyle, in the matter of

Phyllis Petroleum Co., Kansas Area and International Union of Operating Engineers, Local #109. This opinion and award was issued March 22, 1960, and carries the Federal Mediation and Conciliation Service (FMCS) case number 60A-1006.

Arbitrator Doyle within the Phyllis Petroleum arbitration cited above addressed electrical work conducted by a company in the Kansas area. The company divided the Kansas area into three districts and electricians were assigned to each of the districts. The company determined to move an electrician from one district to another and then assigned another electrician to the vacated position. The Union argued that the vacated position should be posted, but Arbitrator Doyle disagreed, pointing out that the determination of the existence of a vacancy is a Management function involving the exercise of discretion. Arbitrator Doyle found the company did not declare the existence of a vacancy; decided there was no resignation, termination or promotion of an employee out of the bargaining unit reducing the compliment of employees; and decided the decision to relocate an employee and replace this employee with another employee in the same classification amounted solely to a change of work assignments for the individuals involved. Arbitrator Doyle found that the interpretation urged by the Union would have the effect of increasing the compliment of employees in a classification regardless of workload and would restrict management's prerogative to direct the working force and to make work assignments in the interest of efficient operations. Arbitrator Doyle based his

decision on Article 8 of the contract between the parties to the arbitration and found that the article did not intend to restrict the right of the company to transfer employees between jobs in the same classification, even though a new work location was involved. The arbitrator found that the Union had failed to sustain its burden to show that the Company violated the contract by failing to post the vacancy for bids when it transferred the employees involved.

ANALYSIS

The resolution of this dispute balances on the question of which body of authority is to be employed in fashioning this matter's outcome. The Union contends that the collective bargaining agreement between the parties controls and points to Article 28 of this agreement in support of this view. Article 28 empowers bargaining unit members to bid on vacant positions and then provides a selection process which is to be utilized in prioritizing bids from among eligible bidders. Section 28.02 of Article 28 grants the highest priority to those bids from applicants working at the facility where the vacancy exists. If no bid is received from an eligible applicant from the facility wherein the vacancy exists, an eligible bidding applicant shall be chosen from applicants working in the agency where the vacancy exists. In the event that no eligible bidder is available from the agency wherein the vacancy exists, Section 28.02 orders that the

job shall be awarded to an applicant working in the bargaining unit wherein the vacancy exists. If none of the above categories are employed, the Employer may award the position by hiring a new employee. Section 28.02 requires that in honoring the priority selection procedures for facility, agency, and bargaining unit, in that order, any such priority category utilized is to be determined on the relative seniority of the eligible bidders within the priority category. As an example, all eligible bidders at the facility wherein the vacancy exists enjoy the highest preference, but among this group seniority controls. This also holds true if applicants are to be chosen from an agency-wide pool.

The Union's argument presumes that the full-time position located with the Parma City School System, in which Mr. Davis was located, was, immediately prior to Mr. Davis's installation into this position, a "vacancy" as defined by Article 28. The Union's arguments as to the selection of bidders on the basis of seniority in comparison to Mr. Davis's seniority is a correct reading of the operation of Section 28.02 of Article 28. However, the issue which first must be decided is whether the facts in this case trigger the application of Article 28, and this question originates with a determination of whether the full-time position at the Parma City School System at issue in this matter was ever a "vacancy" as defined by Article 28.

Management's contention is an extension of the question of whether the full-time position at issue in this matter was a vacancy at the time it was filled by its present incumbent. The

Employer argues that the position located at the Parma City School System now filled by Mr. Davis was at no time a "vacancy" as that term is intended by Article 28 of the contract. The Employer argues that the movement of Mr. Davis's position from the V.A. Hospital to the Parma City School System was not a vacancy, but rather was in the nature of a job reassignment, an employment circumstance not addressed by any language within the collective bargaining agreement between the parties. The Employer rightfully points out that in the event a subject is not addressed by the contract between the parties, Ohio law controls.

The Employer points to definitions within the Ohio Administrative Code which define what a job reassignment is and contends that the movement of Mr. Davis's position and Mr. Davis reflects a job reassignment in that this change in employment circumstance resulted in no change to the position or to the incumbent's headquarters county, classification, or pay. The Employer argues that no position was created, so no vacancy existed. The Employer emphasizes that the number of positions within the bargaining unit neither increased nor decreased as a result of the employment of a position at the Parma City School System, and claims the position represents nothing more than a movement of a position, an exercise of managerial discretion exclusively reserved to Management.

The Employer's argument presumes that the change effected by deleting a full-time position at the V.A. Hospital and placing a full-time position with the Parma City School System is not

addressed by the collective bargaining agreement between the parties. Whatever the definition of job reassignment within Ohio statutory or regulatory law, such a definition plays no part in the determination of this case unless the employment action is not addressed by the collective bargaining agreement between the parties. If it is determined that the deletion of the full-time position at the V.A. Hospital and the placement of a full-time position with the Parma City School System is a job action that is addressed by the collective bargaining agreement between the parties, any definitions within Ohio law relating to this job action are moot, as they are clearly overridden by the higher authority of the collective bargaining agreement. Ohio law serves only as a catchall for those subjects not addressed by the contract between the parties.

Thus, for both the Union's argument and Management's argument there is the same determinative issue, that is, did the job action taken by Management, namely the deletion of the full-time position filled by Mr. Davis and the establishment of a full-time position filled by Mr. Davis at the Parma City School System, represent an employment circumstance addressed by the collective bargaining agreement between the parties.

The issue in this matter as to whether the contract addresses the subject of this arbitration comes down to whether the position filled by Mr. Davis at the Parma City School System is a "vacancy" as intended by Article 28. Section 28.01 of Article 28, in its first paragraph reads:

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

There is no dispute that the position at issue, the position presently filled by Mr. Davis with the Parma City School System, is a full-time position. There is also no dispute that it is a position within the bargaining unit, and it was obviously a position which the agency in this case, the Ohio Rehabilitation Services Commission, determined was necessary to fill. Management provided evidence through the testimony of Ms. Warr, the Commission's area seven manager, of the reasons why a full-time position with the Parma City School System was determined needed by Management.

The only term within the first paragraph of Section 28.01 not defined within the definition for vacancy is, ironically, the term vacancy itself.

Management argues that under the facts of this matter there has been no position which was at any time not filled, and therefore the reality of a vacancy, that is, the absence of a position incumbent, has never occurred. The Employer's argument urges that in order to bid on a vacancy, an empty position must be present and under the facts of this matter the position in question has never been empty. This argument contends that a position that has always been filled and simply moved from one location to another, has never been empty, and therefore could never be reasonably defined as a vacancy. This argument concedes the duties

of the position had been altered but only to the extent that the resulting duties remained within the original classification of the position.

The determination of whether at some metaphysical moment the full-time position at the Parma City School System, presently filled by Mr. Davis, was ever empty, does not lend itself to some simple chronology of events. This determination is, however, at the crux of this matter, because if Mr. Davis simply moved within his position from the V.A. Hospital to the Parma City School System, as if in some vehicle which, on the Employer's table of organization, traveled from the V.A. Hospital in Cleveland, Ohio to the Valley Forge School within the Parma City School System, the position may be viewed as having been constantly filled, and it would be difficult to conclude that such a position was at any time vacant.

On the other hand, if Mr. Davis, while located within his full-time position at the V.A. Hospital in Cleveland, Ohio, was still technically located there when Management created a full-time position at the Valley Forge School, and Mr. Davis jumped from his V.A. Hospital position to the Parma City School System position, the position created at the Parma City School System was empty at the moment of its creation, and therefore subject to the operation of Article 28. The position with the Parma City School System under this scenario was a full-time position in the bargaining unit which Management determined was necessary to fill, and was vacant.

In determining which scenario best describes the employment action taken by Management in this case, it becomes necessary to consider the nature of the two positions filled by Mr. Davis. The more similar the nature of the positions, the more persuasive becomes Management's argument that a position was not created and filled, but only moved. In support of this view there is the fact that the position at the Parma City School System was in the same county, was paid the same, and was classified the same as the original position filled by Mr. Davis at the V.A. Hospital. The position at the V.A. Hospital filled by Mr. Davis was classified Rehabilitation Services Counselor 2 and resided within the Ohio Rehabilitation Services Commission. The full-time position at the Parma City School System has always been classified Rehabilitation Services Counselor 2 and has always resided within the same agency. The position at the V.A. Hospital was devoted to rehabilitating clients for the purpose of promoting employability and independent living, and these same goals are pursued within the full-time Rehabilitation Counselor position presently in place with the Parma City School System. The positions also commanded identical salaries.

It is also the case, however, that the client caseloads assigned to the two positions are vastly different. The V.A. Hospital position addressed a client caseload comprised of military veterans suffering from drug dependency, or psychological trauma, or homelessness, or war inflicted physical handicaps, or any combination thereof. The clients which made up the V.A. position's

caseload were well beyond school age and in many ways presented unique rehabilitative obstacles to overcome.

The caseload assigned to the Parma City School position is comprised of school aged clients who require rehabilitative services significantly different from those required for the clients in the V.A. Hospital caseload. The school system caseload has available to it a support system comprised of educational administrators, teachers, educational and therapeutic experts, parents, and other community resources not commonly found to be available to a caseload made up of veterans. Testimony presented in this case was to the effect that the chances for rehabilitative success for larger numbers of clients were more favorable within the school system caseload, in comparison to the chances of success normally associated with a veterans caseload. Testimony presented in this matter was also to the effect that the Parma City School System position represented a set of career challenges and opportunities that were very attractive to a large number of Rehabilitation Services Counselors employed by the Commission.

It should also be noted that the numerical identifying numbers attached to the two positions are different. The number attached to the Parma City School System position has a group number within it different than that assigned to the V.A. Hospital position because it is in a different group than the V.A. Hospital position. Thus, the school position is identified as 74006.0, while the V.A. position was identified as 72017.0.

There is no dispute in this case that Management has wide and exclusive rights reserved to it in determining the work to be done, the creation of positions to do the work, and the location of these positions. This permits Management the power to establish a table of organization and to distribute the work among positions as it sees fit. Bargaining unit members under Article 28 have a single privilege associated with positions created and located by Management, a privilege associated with selecting an appropriate incumbent for the position. This privilege interferes in no way with the exclusive authority of the Employer to determine where workers are to work and what they are to do. It does, however, guarantee to bargaining unit members the benefits of seniority in choosing among bargaining unit members who is to be selected for a vacant position.

It should be emphasized that the determination at this point in this analysis is whether the contract applies to the employment action taken concerning the Parma City School System position and does not address the definition of job reassignment within the Ohio Administrative Code. As stated previously, the Ohio Administrative Code definition is not encountered unless and until it is determined that the contract between the parties does not address the employment circumstance under review.

It is the arbitrator's finding that the position at the Parma City School System is not the same position that was formerly located at the V.A. Hospital. The job assignments and employment circumstances surrounding these two positions are so different that

the arbitrator is not persuaded that what has occurred is simply the movement of a position at a V.A. hospital to the Parma City School System. The position control numbers for these positions, assigned to these positions by Management, are different. The positions are located in different groups. The clients of the caseloads of these positions are significantly different. The therapeutic techniques and approaches brought to bear from these positions, it is therefore presumed, will also be significantly different. These differences persuade the arbitrator that a position was created at the Parma City School System, a position that did not exist previously. This view leads the arbitrator to find that Mr. Davis was moved from a position at the Cleveland V.A. Hospital to the newly created position with the Parma City School System, and the vacated V.A. Hospital position was subsequently deleted.

The arbitrator also finds that at the moment of creation of the full-time Parma City School System position, Mr. Davis was not located within it, and this newly created full-time position within the Rehabilitation Services Commission which Management determined needed to be filled, was vacant. This state of vacancy, and the nature of this vacant position, fall under the definition of vacancy intended by Article 28 of the contract between the parties. Such a circumstance requires, by operation of the third paragraph of Section 28.01, that the vacant position be posted and that applications from applicants for the position be received.

Following the bidding procedures required by Section 28.01, the selection procedures found within Section 28.02 are to be applied.

As the evidence presented in this matter reflects that operation of Article 28 was not employed in the selection of an incumbent for the vacant position at the Parma City School System, the arbitrator finds that the installation of Mr. Davis within this position by Management represents a managerial action in conflict with the collective bargaining agreement between the parties. Accordingly, the arbitrator orders that this violation be remedied.

AWARD

1. The agency did violate the contract when it reassigned a Vocational Rehabilitation Counselor to the Parma City School System.

2. The grievance is sustained.

3. The full-time Vocational Rehabilitation Counselor position presently located with the Parma City School System shall be posted for bidding under the procedures contained with Section 28.01 of Article 28 of the collective bargaining agreement between the parties.

4. Among the bids resulting from the actions ordered by paragraph 3 of this award, a selection shall be made under operation of the language within Section 28.02 of Article 28 of the collective bargaining agreement between the parties.

5. When a selection is made pursuant to paragraph 4 of this award, the applicant selected shall be installed within the full-time Rehabilitation Counselor position within the Ohio Rehabilitation Services Commission assigned to the Parma City School System. In the event that an incumbent is within this position at the time the applicant selected under operation of paragraph 4 of this award is to be installed, the position shall be vacated, and the applicant selected under operation of Article 28 shall be installed.



Howard D. Silver
Arbitrator

June 8, 1990
Columbus, Ohio