

#685

STATE OF OHIO  
LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration Between:

Office of Collective Bargaining )  
State of Ohio )  
and )  
Ohio Health Care Employees Union )  
District 1199 )  
National Union of Hospital and )  
Health Care Employees, SEIU )  
AFL-CIO )

OPINION AND AWARD

GRIEVANCES OF  
DANA FRITSCHER, PAT GURR,  
RICHARD CASLIN, et al.

This matter came on for hearing on September 11, 1991, in a conference room at the Office of Collective Bargaining in Columbus, Ohio, before Margaret Nancy Johnson, member of The Arbitration Panel selected in accordance with the terms of the agreement between the parties.

Tom Woodruff, President, presented the case for the Union. Also in attendance were Dana Fritsche, Pat Gurr, grievants, and Richard Caslin, delegate.

Rachel Livengood presented the case for the Department of Rehabilitation and Correction. Tim Wagner, Chief of Arbitration Services, was in attendance as second chair. Testimony was taken from Sharon Downs, Acting Assistant to the Deputy Director Personnel and telephonically from Gail Lively, Personnel Administrator.

There were no objections as to the arbitrability of the pending grievance, either upon procedural or upon substantive grounds. Accordingly, then, this matter is properly before the Arbitrator for a final and binding decision.

#### GRIEVANCES

The instant controversy encompasses three grievances arising from a class modernization within the Department of Rehabilitation and Correction, the Agency herein. The first grievance, designated a class action, disputes "withholding of classification upgrade as specified in contract," and requests "upgrade to appropriate classification with back wages and all privileges." Shortly thereafter, on May 29, 1990, Patricia A. Gurr (Meyers) filed a Job Audit Grievance in which she asserts that her job duties belong to the Psychology Assistant II Classification. A third grievance filed by Dana Fritsche on June 29, 1990, protests the classification of Psychology Assistants as Psychology Assistants I when the class modernization study was implemented.

#### ISSUES

The issues presented for resolution in this proceeding may be stated as follows: first, did grievants Pat Gurr and Dana Fritsche meet the qualifications of Psychology Assistants II as of May 6, 1991, and, if so, to what remedy are the grievants entitled; and does the Agreement between the parties provide for

an automatic progression from Psychology Assistants I to II, and, if so, to what remedy is the bargaining unit entitled?

#### CONTRACT PROVISIONS

The following provisions from the Collective Bargaining Agreement are deemed to be pertinent to the within dispute:

#### **ARTICLE 40 - IMPLEMENTATION OF CLASSIFICATION MODERNIZATION STUDY**

##### **Labor Management Committee**

In a continuing effort to accomplish the goals of the State's Classification Modernization Program, to incorporate a non-discriminatory job evaluation and wage determination system, and to recruit and retain professionals, a special Labor-Management Committee will be established, consisting of Union and Employer representatives. The purpose of the committee will be to formulate rules and schedules for implementation of the findings of the classification modernization plan that covers the employees under this Agreement. The plans for implementation shall be within the share of the funds determined for this unit within the funds appropriated for the Class Modernization Study by the Ohio General Assembly.

#### STATEMENT OF CASE

The pending grievances arise from a "class modernization" study undertaken by the State to review the job evaluation and wage determination practices. As a result of the study, certain recommendations were made, the implementation of which was delayed pending the 1986 contract negotiations. As a result of these negotiations, an agreement was reached requiring a full classification modernization study to include the updating of classification specifications and the job evaluation systems (Joint Exhibit #10). By the time of the 1989 contract negotiations, the agreed upon study was not yet complete.

However, in a side letter dated April 14, 1989 (Joint Exhibit #8) the parties agreed on "The Classification Modernization Study for the classifications covered by Units 11 and 12." Included within the side letter was the modification of the prior Psychology Assistant classification by establishing a Level I and Level II. The implementation of these changes give rise to the pending grievances.

The Union maintains that in the course of negotiations the parties addressed the difference between Psychology Assistants I and II. The Union President testified that when asked the difference between the two levels, the state representative from Administration Services responded, "You must meet the minimum qualifications and do the second paragraph duty." The Administrative Services representative testified that she indicated the Level II Psychology Assistant must provide clinical direction and participate in providing in-service training . . . "

By Agreement on March 26, 1990 (Union Exhibit #3) the parties established May 6, 1990 as the implementation date for classification changes including the upgrading of the Psychology Assistants according to the methodology agreed upon by the parties. The reclassification of Psychology Assistants by the Agency to the first level rather than the second led to the filing of the three grievances, the merits of which are now before the Arbitrator. The dispute encompasses two issues: whether grievants Dana Fritsche and Pat Gurr met the qualifications for Psychology Assistants II as of May 6, 1990,

and, whether the Agreement between the parties provides for an automatic progression from Psychology Assistants I and to Psychology Assistants II.

#### POSITION OF THE UNION

The Union maintains that grievants Pat Gurr and Dana Fritsche should have been classified as Psychology Assistants II on May 6, 1990. The minimum qualifications for Psychology Assistants II is that they have a Master's Degree or its equivalent, and three years of work in the field of the type satisfactory to Ohio State Board of Psychology. It is acknowledged that the grievants each had the appropriate degree. In dispute is the work experience of the grievants.

The Union argues the prior work experience of these two employees met the definition of "psychological procedures" as set forth in the Ohio Revised Code addressing psychology law. Work that meets the statutory definition of "psychological procedures" must be deemed to satisfy the requirement that Psychology Assistants II have "three years psychological work experience of the type satisfactory to the Ohio State Board of Psychology."

The testimony pertaining to the employment history of the grievants establishes that they both met the minimum qualifications by having three years psychological work experience of the type accepted by the Ohio State Board of Psychology.

Patricia Gurr had work experience as a counselor at the Seneca County Youth Center sufficient to qualify her as a Psychology Assistant II. Dana Fritsche has an extensive employment history dealing with individual and group counseling, administering and interpreting psychological tests, and personality evaluations. The failure of the Agency to recognize the qualifying work experience of these two employees improperly denied their reclassification as Psychology Assistants II on May 6, 1990.

As a result of the Agency's failure to advance grievant Dana Fritsche to the proper pay scale, this grievant bid on a position outside of the Agency. Her transfer raised her pay rate but not to the extent a reclassification as Psychology Assistant II would have. The Union submits that the proper remedy in the case of Dana Fritsche is for the Agency to offer her the position it improperly withheld on May 6, 1990, and to make her whole for lost earnings. In the case of Pat Gurr, the grievant should be reclassified as a Psychology Assistant II and paid the difference in wages she would have received had she been appropriately upgraded on May 6, 1990 pursuant to the Agreement between the parties.

The Union argues further that bargaining history, the contractual language, and evidence of mutual intent establishes an automatic progression from Psychology Assistant I to II. Any other interpretation would produce a nonsensical result.

It is undisputed that the results of the classification modernization were negotiated by the parties. In mid-April

1989, the parties discussed the difference between Psychology Assistants I and II. The testimony of the Agency representative taken subsequent to the Arbitration hearing is patently unreliable. On the other hand, the written notes of the Union President establish that the agreed upon difference was that the Psychology Assistant II "must do second par. and meet min. quals." The testimony of the Union President is reliable and creditable. It must be found that negotiations concluded with a clear understanding that the difference between Levels I and II is the requirement "to meet the minimum qualifications and do the second paragraph duty."

The Union submits that all psychology assistants in the State of Ohio do the duties of a Psychology Assistant II. Thus, the only real difference between Levels I and II is the length of work experience.

The requirement of three years work experience is the criterion the State itself used on May 6, 1990 to move employees into the Level II classification. There were no additional job duties mandated by the State Agency at that time. There is no evidence that the parties contemplated any other than the criteria used on May 6, 1990 to upgrade employees to the Psychology Assistant II classification.

The argument made by the Agency would result in two employees doing exactly the same work but occupying different classifications and receiving different pay rates. The parties clearly did not contemplate such a result.

It is the position of the Union that the only requirement used to move employees into the Psychology Assistant II classification was the minimum qualifications and performance of the second paragraph duties. All Psychology Assistants meeting these qualifications must be moved to the Level II and receive the proper pay range. Any employees qualifying as of May 6, 1990 are entitled to compensation for lost earnings.

The grievances should be sustained.

#### POSITION OF THE AGENCY

The Agency herein contends that grievants Gurr and Fritsche did not meet the minimum qualifications listed on the face of the classification specification for Psychology Assistants II as of the implementation date on May 6, 1990. As to the second issue raised in this Arbitration proceeding, the Agency asserts that the parties did not agree upon automatic movement from Psychology Assistant I to Psychology Assistant II upon the fulfillment of the minimum qualifications listed on the specification for the Level II classification.

The evidence establishes that Grievant Gurr did not satisfy the minimum requirements on May 6, 1990, for movement to Psychology Assistant II. The Agency does not deem the prior work experience of the grievant at a Youth Center to be equivalent to the type of experience required in the classification. Indeed, the evidence submitted by the Union fails to substantiate the claim of equivalency. The grievant



did not conduct any testing of the type referenced in the Psychology statute submitted by the Union.

Ohio Revised Code 4732.01(c) requires careful examination. The language used and relied upon by the Union mandates that psychology experience include each of the procedures stated in the final conjunctional phrase. As the grievant lacked testing experience, she failed to satisfy the equivalency requirement.

Moreover, Grievant Gurr attributed only an insignificant percentage (5%-10%) of her time to documentation. The Agency deems that the time spent by the grievant on psychological procedures was too slight to qualify the aggrieved for the Psychology II classification.

Grievant Fritsche, also, failed to meet the minimum qualifications on May 6, 1990. There is no documentation to support the testimony of the grievant pertaining to her prior work experience. It is incumbent upon the Agency herein to provide proof of its claim. The Agency asserts that in the case of Grievant Fritsche, the evidence is insufficient to maintain its burden.

Additionally, should the Arbitrator find the evidence qualifies Grievant Fritsche, then, she is not entitled to an order returning her to the Agency. Such an order would exceed the authority of the Arbitrator. The grievant willingly made a choice to leave the Agency. This decision terminated any rights the grievant may have had with the Agency.

As to the second question in this proceeding, the Agency asserts there is insufficient evidence of an intent to provide

automatic movement from Psychology I to Psychology II. The experience requirement is the primary difference between the two classifications. The notes and testimony of the Union President do not establish the Agency agreed to an automatic movement.

On the other hand, the evidence submitted by the Agency indicates that where automatic movement was intended, language in the specification so provides. The absence of such language in the Psychology Assistants specifications establishes that the parties did not intend such movement.

The Union ought not to be permitted to gain through Arbitration that which it was unable to secure at negotiations. The side letters to the contract clearly indicate the Union knew how to secure automatic movement. In the case of Psychology Assistants, it did not do so. Accordingly, the Arbitrator is precluded from finding something in the Agreement which is clearly lacking.

Finally, the parties have, within the Agreement, a mechanism for filing grievances for out of classification work. If a Psychologist Assistant I is performing Level II work, a job audit grievance can be filed.

The grievances should be denied.

#### DECISION

The grievances under consideration arise from the implementation of a class modernization study the pursuit of which had been agreed upon by the parties. On April 14, 1989, the parties indicated their agreement as to the "findings of the

Classification Modernization Study for the classifications covered by Units 11 and 12" including the Psychology Assistants. Pertinent to this case is the mutual agreement to modify the prior Psychology Assistant classification by creating therein two levels: Psychology Assistant I and Psychology Assistant II.

The classification specifications for the two levels were also subject to negotiation between the parties.

A major distinction between the two levels, as discerned in the definition of the "Class Title" is the provision by Psychologist Assistant II's of "advice and consultation on psychological matters" and "clinical direction and training to other treatment team members." The job duties as stated in the specifications differ only insofar as the Level II Psychology Assistant provides:

clinical direction and participates in providing in-service training to other treatment team members (e.g., social workers, lower level psychology assistants, counselors, interns).

The difference in the major worker classification is that the Level II Psychology Assistant is expected to:

prepare and present clinical information and in-service training to non-clinical staff in understandable manner; design research projects and/or gather and analyze psychological data, establish facts and draw valid conclusions consistent with data.

Finally, the minimum qualifications for the Level II class differ in that the Level II Assistant must have "three years of psychological work experience as Psychology Assistant I;" or "alternative, equivalent evidence of Major Worker Characteristics noted above."

On March 26, 1990, the parties entered into an Agreement whereby "affected classifications of Units 11 and 12 shall receive the pay range reassignments as under the Class Modernization Program at the start of the pay period beginning May 6, 1990." It was this implementation Agreement that occasioned a number of grievances arising from the failure of the Agency to upgrade former psychologists to the Level II class.

Prior to the arbitration hearing, the parties reached settlement as to some of the employees affected by the pending grievances. It was stipulated that the following settlement be incorporated into this Award: Any employee that met the minimum qualifications for the Psychologist Assistant II classification on May 6, 1990 shall be reclassified as Psychologist Assistant II retroactive to May 6, 1990, and will be paid the difference in pay between what they have received and what they would have received had they been made Psychology Assistant IIs on May 6, 1990, less appropriate deductions.

The pending grievances raise three remaining questions, the first two of which are factual disputes and the third of which is an interpretation issue. These questions may be posed as follows:

1. Was grievant Dana Fritsche entitled to classification as a Psychology Assistant II on May 6, 1990, in accordance with the Agreement between the parties?
2. Was grievant Pat Gurr entitled to classification as a Psychology Assistant II on May 6, 1990, in accordance with the Agreement between the parties?

3. Did the parties mutually agree to an automatic upgrade from Psychology Assistant I to Psychology Assistant II?

The evidence submitted establishes that the parties had agreed that "employees classified as Psychology Assistants would be changed to Psychology Assistant IIs" if they satisfied the requirements for the job on May 6, 1990. Thus, the grievances of Pat Gurr and Dana Fritsche may be resolved by ascertaining whether these grievants met the minimum qualifications on May 6, 1990. Specifically, in dispute is whether the prior work experience of the grievants satisfied the three years of psychological work experience required of the Level II class. Neither grievant had three years with the Agency, Pat Gurr having a hire date of September 14, 1987, and Dana Fritsche having a hire date of July 17, 1988. Thus, grievant Pat Gurr had to supplement her service to the Agency with approximately four months equivalency work; and Dana Fritsche had to supplement her service with approximately 14 months equivalency work.

To sustain its burden in this matter, the Union submitted the testimony of the grievants as to their prior employment. Additionally, the Union submitted provisions from the Ohio Revised Code, Ohio Psychology Law, wherein the practice of psychology is defined. It is the position of the Union that the work history of both grievants satisfied the statutory definitions and must, therefore, be deemed psychological work experience of the type satisfactory to Ohio State Board of Psychology.

The testimony of Grievant Gurr described her work experience as a counselor at Seneca County Youth Center, a juvenile correctional facility under the jurisdiction of the State. She was employed there for over four months. Her duties included observing behavior of the youths, monitoring their progress, providing reality therapy counseling both individually and in groups.

The Agency contends that Grievant Gurr lacked experience in psychological testing, which the aggrieved explained was not done at the facility. However, the grievant did have experience with this psychological procedure while in graduate school as part of her curriculum.

In addition, the Agency contends that the grievant did not perform the necessary work on a significant basis. The Arbitrator finds, however, that there is no specific requirement that certain procedures occupy a minimal amount of time. There is no distinction in the statute as to how the time spent on the procedures must be allocated. The evidence establishes that for three years, the grievant worked in a capacity in which she utilized psychological procedures.

In the opinion of the Arbitrator, the work performed by Grievant Gurr at the Agency, at the Seneca Youth Center, and as part of her graduate school program, constitute the requisite three years of psychological experience. It is clear that while engaged in these activities, the grievant was working in psychology procedures as required by the Ohio State Board of Psychology. The Grievant Gurr, then, should have been

reclassified as a Psychology Assistant II as of May 6, 1990, and she is entitled to the stipulated difference in pay.

The evidence presented at the hearing as to the experience of Dana Fritsche also establishes at least three years work in psychological procedures such as to satisfy the minimum requirements for the Level II classification. Since 1984, the grievant has been engaged in a variety of psychological procedures as a counselor working under a licensed psychologist. Her work involved testing, counseling, and evaluations of the type stated in the Ohio statute. As a drug and alcohol counselor and a counselor at a Child and Adult Guidance Center, the grievant was involved in identifying behavioral problems and in behavior modification. In the opinion of the Arbitrator, this grievant satisfied the three year work experience requirement.

At no point in the cross-examination of this witness did the Agency challenge her credibility. Nor was any evidence presented which would cause the Arbitrator to question her veracity. At all times throughout the presentation of this testimony, the witness appeared credible and forthright.

The Arbitrator is of the opinion that the post-hearing effort by the State to challenge the testimony is not timely. The question why wasn't the information presented earlier is a valid inquiry; but, there may be reasonable explanations which the Union would be precluded from offering. Accordingly, in the opinion of the Arbitrator, the evidence presented under oath remains unchallenged.

The grievance, then, of Dana Fritsche is granted. It remains to consider the appropriate remedy. Consistently, when an error has been made in job placement, the proper remedy is to offer the grievant the position which would have been made available had the error not occurred. The Agency contends that as the grievant left her position with the Agency, she forfeited any right to return thereto.

The Arbitrator does not agree. In assessing a remedy, the Arbitrator is compelled to return to the time of the incident giving rise to the grievance and to fashion a remedy nunc pro tunc. Arbitral awards must have a retroactive application if the grievance procedure is to have any validity. In the opinion of the Arbitrator, the grievant is entitled to an offer of a position with the Psychology Assistants II and to back pay determined by the difference between what she actually earned and what she would have earned had she been properly placed, less appropriate deductions.

It remains to consider the third question which is recognized to be the more difficult issue in this proceeding. The Arbitrator has pondered upon and struggled with the question as to whether or not Psychology Assistants I move automatically to the Level II classification.

In answering this question, the Arbitrator has resorted to principles of labor arbitration which are well recognized and of long standing. The Arbitrator is limited to the Agreement between the parties. Her authority derives from the written contract which she is expressly precluded from modifying, either



by deletion or addition. Therefore, any contractual obligation or privilege must originate in the Agreement. Nowhere in the side letters or the 1989 contract negotiated by the parties can the Arbitrator find any language which would indicate an automatic progression from Level I to Level II in the Psychology Assistant classification. There is simply no written language upon which the Arbitrator can rely.

The Union argues that in the course of the 1989 negotiations, discussions were held which would support the conclusion the parties intended an automatic progression. Further, the Union argues that grievance answers issued by the Agency on this very question indicate an acceptance of the Union position on automatic progression. The Arbitrator recognizes these indications of intent. In the absence of some contract language, however, the Arbitrator is without authority to implement this alleged intent.

Grievance settlements and bargaining history are, indeed, useful tools in interpreting ambiguous contract language. But they cannot be used to rewrite the Agreement. In the case at hand, the Arbitrator cannot find any ambiguous language to interpret.

The Union further argues that the position of the Agency would lead to a "nonsensical" situation. In this regard, the Arbitrator again understands the concerns of the Union. Employees occupying the class of Psychology Assistants I ought to know what the terms of progression will be or by what means

they may become classified at Level II. However, this is a matter for negotiations, not arbitral decision-making.

The Agency contends that the Union herein is attempting to secure through arbitration what it failed to get at negotiations. The Arbitrator does not agree. Rather, the Arbitrator finds that the issue of progression for Psychologist Assistants was never addressed in bargaining. The evidence on the discussion between the parties as to the differences in the two levels, does not, in the opinion of the Arbitrator, qualify as negotiations on the subject of automatic progression.

The Arbitrator notes that there are approximately seven months left in the Agreement between the parties. It is the opinion of the Arbitrator that the subject of automatic progression ought to be addressed at the forthcoming contract negotiations. Nothing in this opinion, however, should be deemed to require a retroactive application of any terms which may hereafter be negotiated.

The Arbitrator finds that presently there is no automatic progression for Psychology Assistant I to Psychology Assistant II. Such an automatic progression cannot be established by arbitral authority but must be established by negotiation on the subject by the parties.

#### AWARD

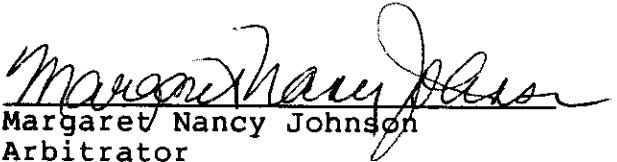
1. The grievance of Pat Gurr (Meyers) is hereby sustained and the grievant is to be made a Psychology Assistant II retroactive to May 6, 1990, and will be paid the difference in

pay between what she has received and what she would have received less appropriate deductions, had she been made a Psychology Assistant II on May 6, 1990.

2. The grievance of Dana Fritsche is sustained and the grievant is to be made a Psychology Assistant II retroactive to May 6, 1990, and will be paid the difference in pay between what she has received and what she would have received less appropriate deductions, had she been made a Psychology Assistant II on May 6, 1990.

3. The grievance settlements reached prior to the hearing are incorporated herein and the affected employees meeting the minimum requirements of the Psychology Assistant II classification on May 6, 1990 will be so classified retroactive to May 6, 1990, and paid the difference in pay between what they have received and what they would have received less appropriate deductions, had they been made a Psychology Assistant II on May 6, 1990.

4. The grievance as it relates to automatic progression is denied and the matter rendered a subject for bargaining at the forthcoming contract negotiations.

  
Margaret Nancy Johnson  
Arbitrator

Dated this 17<sup>th</sup> day of November, 1991.