

ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 686

OCB GRIEVANCE NUMBER: 27-22-910118-0102-02-11

GRIEVANT NAME: DOUGLAS, WYNONNA

UNION: 1199

DEPARTMENT: REHABILITATION & CORRECTION

ARBITRATOR: SILVER, HOWARD

MANAGEMENT ADVOCATE: COE, ROGER

2ND CHAIR: LIVENGOD, RACHEL

UNION ADVOCATE: WOODRUFF, TOM

ARBITRATION DATE: O C T O B E R 3 , 1 9 9 1

DECISION DATE: NOVEMBER 8, 1991

DECISION: DENIED

CONTRACT SECTIONS

AND/OR ISSUES: DID THE EMPLOYER VIOLATE THE AGREEMENT WHEN IT CHANGED MS. DOUGLAS' WORK SCHEDULE FROM FLEX TIME TO AN 8:00 A.M. TO 4:30 P.M. MONDAY THRU FRIDAY SCHEDULE THUS CAUSING HER TO LOSE SHIFT DIFFERENTIAL PAY?

HOLDING: "WHILE THE ARBITRATOR HEREIN IS NOT BOUND BY THE PREVIOUS DECISION ISSUED BY ARBITRATOR CURRY (REFERENCED BY MANAGEMENT IN THIS CASE), ARBITRATION BY ITS NATURE FAVORS CONSISTENCY WITH AND RESPECT FOR PREVIOUS DECISIONS OF ARBITRATORS ON MATTERS THAT ARE ANALOGOUS TO ISSUES UNDER REVIEW. SUCH A PHILOSOPHY PROVIDES FINALITY TO THE ARBITRATION PROCESS AND COMFORT TO THE PARTIES, AT LEAST TO THE EXTENT THAT THEY MAY PROCEED IN THEIR RELATIONSHIP WITH ONE ANOTHER WITH SOME LEVEL OF CERTAINTY THAT DECISIONS PREVIOUSLY MADE ON ISSUES AFFECTING THEM WILL BE RESPECTED AND FOLLOWED. THE ARBITRATOR IS NOT BOUND BY THE DETERMINATION OF ARBITRATOR CURRY ON THIS ISSUE, BUT FINDS NOTHING WITHIN THE EVIDENCE OF THIS CASE OR IN THE ARGUMENTS PUT FORTH BY THE PARTIES TO CONTRADICT THIS CONCLUSION. THE EMPLOYER ACTED WITHIN THE AUTHORITY RESERVED TO THE EMPLOYER AND DID NOT VIOLATE THE CONTRACT BETWEEN THE PARTIES."

COST: \$600.00



Howard D. Silver
Arbitrator
Columbus, Ohio

In the Matter of Arbitration
Between

#686

The State of Ohio

and

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

Grievant:
Wynonna Douglas

Grievance Number:
27-22-910118-0102-02-11

APPEARANCES

For: The State of Ohio

Roger A. Coe, Advocate

Rachael Livingood, Management Representative

James K. Jackson, Management Representative

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

Tom Woodruff, Advocate

Richard Bowrowski, Labor Representative

ISSUE

Did the Employer violate the collective bargaining agreement
between the parties? If so, what shall the remedy be?

The hearing in this matter was held on October 3, 1991 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 October 7, 1991, following the submission of a State Employment Relations Board report, case number 89-ULP-02-0119, for the arbitrator's consideration.

STATEMENT OF THE CASE

The Grievant, Wynonna Douglas, is an employee of the Ohio Department of Rehabilitation and Correction at the Pickaway Correctional Institution. Ms. Douglas has provided 17 years of state service and for the past seven years has served as a psychology assistant at the Pickaway Correctional Institution. Ms. Douglas possesses a bachelor of science degree in psychology from The Ohio State University and has also secured a master's degree in psychology from The Ohio State University.

During all times relevant to this proceeding Ms. Douglas has been certified as a licensed professional clinical counselor by the Counselor and Social Worker Board of Ohio. Prior to June, 1990, Ms. Douglas had received no disciplinary action in her employment with the State of Ohio and her performance as a state employee had been evaluated as more than satisfactory.

In March, 1989, within a publication of the Ohio Psychological Association entitled The Ohio Psychologist, an article prepared by Ms. Douglas about rational emotive therapy was published. Within this article Ms. Douglas described her use of this therapeutic approach to modify anger and aggressive behavior in prison inmates. On the first page of this article appeared a brief description of Ms. Douglas which read as follows:

Wynonna Douglas, M.A. is a licensed professional clinical counselor working as a psychology assistant at Pickaway Correctional Institution. She has conducted the rational emotive therapy group there for the past five years.

The above description was prepared not by Ms. Douglas but by employees of The Ohio Psychologist.

In June, 1990, within The Ohio Psychologist, a second article by Ms. Douglas was published about rational emotive therapy and its use by Ms. Douglas among sex offenders at the Pickaway Correctional Institution. On the first page of this article appeared the following description of Ms. Douglas which was not prepared by Ms. Douglas but by employees of The Ohio Psychologist:

Wynonna Douglas, M.A., has been a licensed professional clinical counselor (LPPC) at Pickaway Correctional Institution for six years. Earlier, she was employed at the Southwest Mental Health Center in Columbus for ten years.

Following the appearance of Ms. Douglas's second article in The Ohio Psychologist, Ms. Douglas received a letter of commendation from the Director of the Ohio Department of

Rehabilitation and Correction dated June 20, 1990, congratulating Ms. Douglas on her efforts in the field of rational emotive therapy and on her published articles. Ms. Douglas also received a letter from Albert Ellis, Ph.D., the originator of rational emotive therapy, congratulating Ms. Douglas on her work and her article.

On June 14, 1990, the psychology supervisor at the Pickaway Correctional Institution, John W. Mize, Ph.D., the direct supervisor of Ms. Douglas, prepared a report of employee corrective action. This report stated that on June 13, 1990, Dr. William W. Gilbert, the South Regional Psychological Services Administrator within the Ohio Department of Rehabilitation and Correction and Dr. Mize's supervisor, contacted Dr. Mize and informed him that Ms. Douglas had published her June, 1990 article in violation of supervisory rules promulgated by the Ohio State Board of Psychology. This report by Dr. Mize noted an allegation that Ms. Douglas had misrepresented herself as an independent practitioner and also alleged that Ms. Douglas had not consulted with Dr. Mize prior to submitting her article for publication. Under "type of corrective action" on this form, an X is marked by "request for further disciplinary action."

On June 18, 1990, Dr. Gilbert directed a memorandum to Reginald A. Wilkinson, the South Regional Director of the Ohio Department of Rehabilitation and Correction. This memorandum from Dr. Gilbert referenced Ms. Douglas's June, 1990 article within The Ohio Psychologist and complained that Ms. Douglas had been described within the biographical paragraph appearing on the first

page of this article in a misleading way. Dr. Gilbert stated within his memorandum that Ms. Douglas was misrepresented as a licensed professional clinical counselor at the Pickaway Correctional Institution rather than as a psychology assistant at this institution. Dr. Gilbert claimed within his memorandum that this misleading description was a violation of the Ohio Administrative Code and claimed this misrepresentation to be a serious violation of Ohio psychology laws and rules. Dr. Gilbert further claimed within his memorandum that this misrepresentation could be interpreted as a representation of an independent and illegal practice which would constitute a criminal violation.

On June 20, 1990, Elizabeth W. Adamson, Operations Manager for the Ohio Psychological Association, directed correspondence to Dr. Gilbert. Ms. Adamson requested that Dr. Gilbert accept the apologies of the association for inadvertently omitting words describing Ms. Douglas within her June, 1990 article as working as a psychology assistant at Pickaway Correctional Institution. Ms. Adamson assured Dr. Gilbert that a correction would appear in the August, 1990 issue of The Ohio Psychologist in an errata section. A correction did appear in the August, 1990 issue of The Ohio Psychologist on page 19, under errata, and within this paragraph Ms. Douglas was described as working as a psychology assistant at Pickaway Correctional Institution.

On June 26, 1990, John S. Dean, Deputy Warden at the Pickaway Correctional Institution, directed a memorandum through Warden James Jackson of the Pickaway facility to Paul Kavanaugh, Deputy

Director of the Ohio Department of Rehabilitation and Correction. Within this memorandum Deputy Warden Dean stated that Psychology Supervisor John Mize had brought to his attention information Dr. Mize had received from Dr. Gilbert indicating possible professional and departmental violations on the part of Ms. Douglas concerning her June, 1990 article. Deputy Warden Dean stated within his memorandum that he advised Dr. Mize to speak to Ms. Douglas and suggested that Dr. Mize have Dr. Gilbert submit correspondence indicating what he believed was a violation, identifying what standards or codes had been violated. This memorandum stated that Dr. Mize believed that some type of disciplinary action was warranted as to Ms. Douglas.

The June 26, 1990 memorandum by Deputy Warden Dean also stated that he had discussed this matter with Warden James Jackson, and based on the information presented by Dr. Mize it was the opinion of the administration of the Pickaway Correctional Institution that no departmental rule had been violated and any violation of Ohio Psychology Board standards should not be determined by the institution. This memorandum stated that Dr. Mize presented a typed letter of corrective counselling to Deputy Warden Dean for his signature and Dr. Mize was informed of the institution's position. This memorandum indicated Dr. Mize was instructed not to issue any form of disciplinary action to Ms. Douglas.

On June 27, 1990, Warden James Jackson of the Pickaway Correctional Institution directed a memorandum to Deputy Director Kavanaugh. Warden Jackson informed Deputy Director Kavanaugh that

the instructions to Dr. Mize from Deputy Warden Dean, to the effect that no disciplinary action was to be taken at that time against Ms. Douglas, constituted orders from Warden Jackson.

On June 29, 1990, Dr. Gilbert directed a second memorandum to South Regional Director Wilkinson concerning Ms. Douglas's article published in the June, 1990 issue of The Ohio Psychologist. This memorandum noted Dr. Gilbert's receipt of the letter issued by Ms. Adamson stating that an appropriate correction would be made within the next edition of The Ohio Psychologist regarding Ms. Douglas's credentials. While Dr. Gilbert found the letter from Ms. Adamson satisfied one issue regarding misrepresentation of professional credentials, Dr. Gilbert continued to recommend that disciplinary action be imposed on Ms. Douglas under allegations of insubordination and unauthorized release of information. Dr. Gilbert alleged within his memorandum that Ms. Douglas had violated a direct order from Dr. Mize by issuing materials involved in the sex offender treatment program without consulting with Dr. Mize, and also claimed that programmatic information regarding institution practices had been released for publication without the prior knowledge or authorization of her immediate supervisor, institution administrator, or central office administrators.

On July 11, 1990, Deputy Director Paul A. Kavanaugh, head of Human Resources for the Ohio Department of Rehabilitation and Correction, directed a memorandum to Reginald A. Wilkinson, South Regional Director of the Department. Within this memorandum Deputy Director Kavanaugh stated that he was directed by the Director of

the Department to look into the matter of the alleged misrepresentation associated with Ms. Douglas as reported by Dr. Gilbert. Deputy Director Kavanaugh, within his memorandum, found no cause to impose discipline upon Ms. Douglas and questioned the handling of this situation by Drs. Gilbert and Mize.

On September 21, 1990, Deputy Warden Dean of the Pickaway Correctional Institution issued a memorandum to Deputy Director Kavanaugh. This memorandum noted that on September 14, 1990, Deputy Warden Dean spoke with Dr. Mize in reference to his input into an article written by Ms. Douglas which had been published. According to this memorandum, Dr. Mize told Deputy Warden Dean that he had reviewed the article, made some grammatical corrections prior to the article being submitted for publication, and also told Deputy Warden Dean that he had not known the article would be published. At hearing, Ms. Douglas testified that she had told Dr. Mize that she wished to publish the article and asked him to review the article to ensure that it was grammatically correct.

Since January, 1984, Ms. Douglas had worked at the Pickaway Correctional Institution under a flexible work schedule used primarily to implement a sex offenders program which met on Monday and Tuesday evenings. This sex offender program was implemented by Ms. Douglas as a psychology assistant under the supervision of her immediate supervisor, Psychology Supervisor Dr. Mize.

On August 8 and August 13, 1990, Dr. Mize submitted memoranda to Stephanie L. Miller, Ph.D., Psychology Supervisor at the Southern Ohio Training Center, in her role as Chairperson of the Sexual Offender Approval Process (S.O.A.P.) Committee. Within

these memoranda Dr. Mize described the sexual offender program facilitated and coordinated by Ms. Douglas and also provided background information about Ms. Douglas in terms of her competency to lead these groups. Within the final paragraph of the August 13, 1990 memorandum, Dr. Mize wrote, "Her skill and expertise in working with this difficult population has been demonstrated consistently. This supervisor is confident in her clinical competency in coordinating and co-facilitating this program under my professional supervision."

On October 10, 1990, Deputy Director Kavanaugh directed a memorandum to South Regional Director Reginald A. Wilkinson. Within this memorandum Deputy Director Kavanaugh stated that he had read all of the communications regarding the alleged misrepresentation of Ms. Douglas within The Ohio Psychologist and expressed the opinion that there was no evidence of a violation of any rule or law. Deputy Director Kavanaugh urged South Regional Director Wilkinson to bring the matter to an immediate conclusion.

On October 12, 1990, Dr. Mize issued two memoranda, one to all concerned and the other to Ms. Douglas, stating that until further notice, the sex offender treatment groups led by Ms. Douglas were to be halted. Within a memorandum directed to Ms. Douglas dated October 12, 1990, Dr. Mize stated that this was in compliance with the Sex Offender Approval Process Committee decision of October 5, 1990. Dr. Mize stated within this memorandum that no groups were to meet and no referrals were to be taken into the program until it was restructured in accordance with the Committee's guidelines.

On October 22, 1990, Dr. Mize issued a memorandum to all concerned, stating the following:

I have been informed that treatment services for sex offenders at the Pickaway Correctional Institution are to resume immediately. The group that met previously is to begin again, and will meet on a regular basis until a new set of services, meeting with S.O.A.P. Committee standards, is implemented.

Until that time, the previously existing group will suffice on an interim basis, and will be implemented by Ms. Douglas, under my professional supervision.

In correspondence dated October 16, 1990 and received by the Ohio Department of Rehabilitation on October 29, 1990, the Portage Path Community Mental Health Center, in the persons of Claudia S. Williams, R.N.C. and Avery Zook, Ph.D., informed Dr. Gilbert of allegations made by two clients of the Portage Path Community Mental Health Center who had been referred by the Regional Adult Parole Authority to the Portage Center's outpatient child sex offender program. Within this correspondence Dr. Gilbert was informed that during a group session one of the clients stated that while he had been incarcerated at the Orient Correctional Institution, he chose not to enter a therapeutic group provided for child sex offenders because the group facilitator, Ms. Douglas, was "too wild". This individual claimed that Ms. Douglas frequently wore no underwear, alleged her blouses were of sheer fabric, and claimed that Ms. Douglas had positioned herself in such a fashion that it was obvious to the members of the group that she was not wearing underwear.

This letter to Dr. Gilbert from the Portage Path Community Health Center also claimed that another group member who was incarcerated at Orient between 1987 and 1989, claimed that Ms. Douglas would frequently ask group members such questions as, "Do you want to have sex with me?" and "What would you do to me if you could have sex with me right now?" This correspondence to Director Gilbert expressed serious concerns regarding the counter-therapeutic effects of such activities, asked that the Department direct its attention to this matter, and expressed appreciation for any efforts that could be made in order to assure that child sex offenders were being provided with appropriate rehabilitative services.

As a result of the information directed to the Department by the Portage Path Community Mental Health Center within its letter of October 16, 1990, Warden Christine Money, Warden of the Franklin Pre-Release Center, was appointed to conduct an investigation regarding the allegations made against Ms. Douglas by the inmates described within the Portage Path Community Mental Health Center's correspondence of October 16, 1990. Warden Money was appointed to this task on November 14, 1990. The results of Warden Money's investigation appear within a memorandum dated December 12, 1990, from Warden Money to Alan J. Lazaroff, Chief Inspector of the Ohio Department of Rehabilitation and Correction.

Within her report of investigation, Warden Money describes a number of interviews, including interviews with the two former inmates who made the allegations against Ms. Douglas; Registered Nurse Williams and Dr. Zook, who directed the October 16, 1990

letter from the Portage Path Community Mental Health Center to the Department; Dr. Gilbert; Dr. Maureen Black who was the Psychology Services Director at the Orient Correctional Institution at the time the alleged inappropriate activity had occurred; two inmates who were identified by one of the inmates making the allegations against Ms. Douglas as having participated in the sex offender group led by Ms. Douglas; Dr. Mize; and Ms. Douglas, who was interviewed in the presence of Richard Bowrowski, a Union representative.

Warden Money, within her investigative report to Chief Inspector Lazaroff, identified three issues of concern. One involved Ms. Douglas's dress at the institution. Warden Money recommended that this issue should be addressed by Dr. Mize but found no violation of departmental standards of employee conduct by Ms. Douglas under this aspect of the claims made against Ms. Douglas.

A second issue addressed by Warden Money within her report was the allegation that Ms. Douglas was resistant to supervision. Warden Money suggested that appropriate supervisory staff meet and develop an action plan to deal with any inappropriate behavior in this regard. Warden Money stressed the importance of enforcing the chain of command which encompassed Ms. Douglas and stated that it was critical that all levels of supervision within the chain of command at the institution provide effective supervision to Ms. Douglas.

The third issue, the allegations lodged against Ms. Douglas by the former inmates, produced a recommendation from Warden Money that a decision be made whether to conduct a more in-depth investigation involving these allegations. Warden Money found, however, "At this point, there is not enough evidence to charge Ms. Douglas with a violation of the standards of employee conduct."

On the final page of her investigative report, Warden Money wrote as follows:

Even with the restructured program, I have serious concerns about her continuing in the delivery of any treatment services to sex offenders. I feel that if the decision is made for her to continue to provide services to sex offenders, she needs to be closely supervised. It should be noted that management has the right to make work assignments for bargaining unit employees.

On December 21, 1990, Chief Inspector Lazaroff directed a memorandum to the Director of the Ohio Department of Rehabilitation and Correction addressing the investigative report issued by Warden Money concerning Ms. Douglas. Within this memorandum Chief Inspector Lazaroff listed his own recommendations based on Warden Money's investigation and report. These recommendations included developing a plan of action to force Dr. Mize to more closely supervise Ms. Douglas in her everyday work activities, her interaction with inmates, her attire at work, and her compliance with the chain of command. Chief Inspector Lazaroff recommended that as Warden Money could not substantiate the allegations against Ms. Douglas as to inappropriate behavior during the conduct of sex offender groups, there was no reason to continue investigating these allegations any further. Chief Inspector Lazaroff

recommended that Warden Jackson of the Pickaway Correctional Institution set a deadline for Dr. Mize to implement a new sex offender program and that Ms. Douglas be either taken off the sex offender program permanently or placed on a rotating schedule with other psychology assistants for leading this program. In the event Ms. Douglas were to be allowed to continue leading sex offender programs, Chief Inspector Lazaroff recommended that she be strictly supervised by Dr. Mize.

The final paragraph of Chief Inspector Lazaroff's September 21, 1990 memorandum to the Director of the Department reads as follows:

Much of this matter is a result of poor supervision over Wynonna Douglas. Many supervisory staff at PCI perceive that Ms. Douglas was unsupervisable because she could easily bypass the chain of command and obtain what she wished by going directly to Central Office. I believe that the above recommendations will enable PCI to begin supervising Ms. Douglas more closely and counter the perception that Ms. Douglas has any special status.

On January 3, 1991, Chief Inspector Lazaroff directed a letter to Ms. Douglas noting that the Office of the Chief Inspector had conducted an investigation regarding allegations against Ms. Douglas by several confidential sources. Inspector Lazaroff notified Ms. Douglas that he was happy to inform her that none of these allegations were substantiated by Warden Money's investigation and the investigation had been concluded. Inspector Lazaroff also informed Ms. Douglas that no evidence had been uncovered reflecting violation of any of the Department's standards of employee conduct.

Within his January 3, 1991 correspondence to Ms. Douglas, Inspector Lazaroff also stated that while there was no evidence of misconduct, there were times when Ms. Douglas exercised poor judgment in her work with inmates. Inspector Lazaroff stated within his letter that he had asked Warden Jackson to take remedial action to prevent these lapses of judgment from reoccurring. Ms. Douglas was also informed within this letter that Warden Jackson would be meeting with her to discuss a plan of action.

On January 16, 1991, Ms. Douglas was directed to report to Warden Jackson's office. At this meeting a discussion was held with Ms. Douglas about the investigations conducted by Warden Money and Chief Inspector Lazaroff. Directives were issued to Ms. Douglas and these directives were memorialized within a memorandum presented to Ms. Douglas dated January 16, 1991, authored by Warden James K. Jackson.

The memorandum delivered to Ms. Douglas on January 16, 1991 references the investigations conducted by Warden Money and Chief Inspector Lazaroff, notes that these investigations reflected no clear violations of the Department's code of conduct, and states that all investigations of allegations made against Ms. Douglas by former inmates had been concluded. It was further noted, however, that the Chief Inspector had made specific recommendations in regard to the duties Ms. Douglas was to perform and the manner in which she was to perform these duties. Among these recommendations it was noted that Chief Inspector Lazaroff recommended closer supervision of Ms. Douglas and the importance of Ms. Douglas understanding her subordinate role, both administratively and

professionally, under the supervision of the institution's psychology supervisor. In consequence of the above the following directives were issued:

1. A special performance evaluation will be ordered immediately.

2. You are to be removed from flex time and your work hours will be from 8:00 a.m. to 4:30 p.m., Monday through Friday, commencing two weeks from this date.

3. You are immediately restricted from teaching, facilitating, or having any other involvement in PCI's sexual offenders group until further notice.

4. You will submit to supervision by the psychology supervisor, in that you will comply with directives fully and will not attempt to circumvent the supervisor.

5. Your attire and demeanor will be professional and appropriate for an adult male prison population.

6. A second special performance evaluation will be ordered 90 days from now and if there is indication you are not following the full intent of your supervisor's directives, I will assume you are either unwilling or unable to comply with my direct orders and will take the appropriate action.

James K. Jackson, Warden

Effective January 24, 1991, Ms. Douglas was removed from flex time and therefore was not permitted to provide therapeutic services on Monday and Tuesday evenings as had previously been the case. This loss of flex time also resulted in the loss of differential pay which had been paid to Ms. Douglas when she had been permitted to work during evening hours at the institution. Ms. Douglas's access to a flexible time schedule was restored effective May 7, 1991.

On February 23, 1991, a performance evaluation addressing the work of Ms. Douglas at the Pickaway Correctional Institution was prepared and signed by Ms. Douglas's supervisor and Warden Jackson. This evaluation listed performance categories which included quantity and quality of work, timeliness, team effort/cooperation, problem solving/decision making, communicating, and planning/scheduling. In all categories Ms. Douglas was evaluated as above expectations. For team effort/cooperation, defined as contributing to a group effort and establishing positive working relationships with others, it was noted that Ms. Douglas works toward the group effort in a diligent fashion and was rated above expectations.

While Ms. Douglas has been permitted since May 7, 1991 to provide therapeutic services during evening hours at the institution, she has not been returned to the sex offender group. Ms. Douglas has provided therapeutic services through values verification and interpersonal groups.

POSITIONS OF THE PARTIES

Position of the Union

The Union contends that the directives issued to Ms. Douglas by Warden Jackson on January 16, 1991 constitute disciplinary action against the Grievant. The Union points out that Article 24 of the collective bargaining agreement between the parties, entitled Hours of Work and Overtime, contains within it Section 24.11, which provides that the present practice of flex time shall

be continued. The Union contends that by removing from Ms. Douglas the opportunity to enjoy the benefits of flex time scheduling between January 24, 1991 and May 7, 1991, the Grievant lost flexibility in her schedule which had previously been enjoyed, and also lost wages in that the Grievant was excluded from the opportunity to earn a shift differential from which she had benefited as a result of working during evening hours during the work week.

The Union contends that the elimination of flex time to the benefit of Ms. Douglas between late January, 1991 and early May, 1991, and the resulting loss in shift differential, constitute disciplinary action imposed upon the Grievant under Article 8 of the collective bargaining agreement between the parties. The Union points out that Section 8.02 of Article 8 provides that the principles of progressive discipline shall be followed. According to the language of Section 8.02, these principles usually include a verbal reprimand, written reprimand, suspension, and demotion or removal. The Union contends that under the language of Section 8.02 of Article 8 of the contract between the parties, there is implied by this language the fact that there are other disciplinary steps beyond those expressly listed. The Union contends that what has occurred in this case to Ms. Douglas constitutes disciplinary action under Article 8, disciplinary action beyond those disciplinary circumstances expressly described within Section 8.02, and therefore Ms. Douglas has had imposed upon her a form of disciplinary action which may only be imposed by the Employer for just cause.

The Union argues that the disciplinary action imposed upon the Grievant originated with the publication of Ms. Douglas's articles within The Ohio Psychologist. The Union claims that it was professional jealousy on the part of her supervisors that led to the allegations made against Ms. Douglas concerning biographical data appearing within the second of these articles, a description for which Ms. Douglas had no responsibility and for which she should have suffered no liability or claim of misconduct. The Union contends that Dr. Gilbert intended punitive action against Ms. Douglas because of professional jealousy concerning Ms. Douglas's articles within The Ohio Psychologist.

The Union points out that after all of the investigations were completed in this matter, including the investigations of Warden Money and Chief Inspector Lazaroff, no wrongdoing had been found to have been committed by the Grievant. The Union points out that Ms. Douglas has no history of prior discipline and also stresses that no claims of problems with the supervision of the Grievant had arisen prior to the publication of these articles.

The Union points out that Ms. Douglas had never been informed prior to the publication of her articles with The Ohio Psychologist of any problems in providing supervision to her or her position. The Union also points out that there is no legitimate reason to have removed Ms. Douglas from the sex offenders program, especially since the sex offender program now occurs during regular working hours at the institution and does not require evening scheduling.

In support of its claims, the Union requested that the arbitrator consider SERB v. Fallsvew Psychiatric Hospital, 89-ULP-02-0119, a report issued April 5, 1991 by a SERB hearing officer.

The Union emphasizes that Ms. Douglas has been found guilty of no violation of the Department's code of conduct but has suffered nonetheless as if she had. The Union contends that the Grievant has been disciplined without just cause, in violation of disciplinary grievance procedures contained within Article 7 of the collective bargaining agreement between the parties, and urges that the grievance be sustained, the amount of pay differential lost be restored to the Grievant, and the Employer be directed to cease and desist in activities directed toward Ms. Douglas which violate rights and privileges guaranteed to the Grievant and other bargaining unit members under the contract between the parties.

Position of Management

The Employer argues that this matter is not arbitrable, claiming that the Grievant has not been disciplined and Management has simply exercised rights reserved to the Employer as agreed by express language within the collective bargaining agreement between the parties. The Employer points out that none of the procedures necessary to disciplining a bargaining unit member have been carried out in regard to Ms. Douglas and nothing within the files maintained by the Employer reflect any disciplinary action as having been imposed upon the Grievant.

The Employer reminds the arbitrator in its arguments that the Union bears the burden of proof as to whether the contract has been

violated as claimed by the Union. The Employer claims that no evidence of disciplinary action has been presented as no evidence of disciplinary action against the Grievant exists.

The Employer also points to Article 6 of the contract which binds both the Employer and the Union to an agreement that neither shall unlawfully discriminate against any employee in the bargaining unit. The Employer urges that there has been presented no evidence that Ms. Douglas has been discriminated against on the basis of any protected category appearing within Article 6 and no such discrimination occurred. The Employer also points to Article 5 of the contract between the parties, entitled, Management Rights, which provides that except to the extent modified by the agreement, the Employer reserves to itself, exclusively, all of the inherent rights and authority to manage and operate its facilities and programs. The Employer agrees that Article 5 prohibits Management from discriminating against any employee in the exercise of these rights or exercising these rights for the purpose of invalidating any contractual provision, but Management contends that it has done neither in this case and has simply changed, for a limited time and to a limited degree, the supervisory circumstances under which the Grievant is employed. The Employer claims that nothing within these changes has violated any of the express language within the contract between the parties.

Management does not disagree that some professional jealousy may have motivated Ms. Douglas's supervisors in their responses to Ms. Douglas's published articles within The Ohio Psychologist. The Employer, however, points out that in every instance wherein Ms.

Douglas's supervisors had recommended disciplinary action, these recommendations had been rejected by the Employer. The Employer urges that the arbitrator not be confused by these earlier recommendations for disciplinary action, claiming that they have nothing to do with the resulting changes in the supervisory circumstances of Ms. Douglas's employment.

In reference to Article 24 which specifically contains Section 24.11, entitled Flexible Work Schedules, the Employer invites the arbitrator to consider the arbitral decision and award of Arbitrator Earl Curry issued November 7, 1989, which addressed Article 22 within a prior contract between the parties and in so doing construed language which is identical to language now appearing within Section 24.11 of the contract between the parties.

The Employer urges that no violation of the collective bargaining agreement between the parties has occurred in this matter and therefore requests that the grievance either be determined not arbitral or, in the alternative, denied in its entirety.

DISCUSSION

The parties have each presented to the arbitrator cases which have addressed the authority of the Employer to unilaterally require a change in a flexible working schedule of a bargaining unit member covered by a collective bargaining agreement between the parties which contained language identical to language which is now found within Section 24.11 of the collective bargaining

agreement between the parties to this proceeding. These conflicting cases address the same employee and the same factual scenario. The employee considered by these cases was a part-time employee of the Fallsview Psychiatric Hospital who had been required to relinquish a flexible schedule previously enjoyed so he could participate in treatment team meetings occurring during the regular work day at the hospital. One of these cases is an arbitration decision and award issued by Arbitrator Earl Curry, issued November 7, 1989. The other case addresses a claimed unfair labor practice decided by the State Employment Relations Board in case number 89-ULP-02-0119.

The decision of the State Employment Relations Board addressed a claim of an unfair labor practice committed by the State of Ohio under Ohio Revised Code Sections 4117.11(A)(1) and (A)(5). The State Employment Relations Board determined that the change in scheduled working hours of the employee, having been effected without bargaining with the Union about this change, constituted a refusal to bargain in violation of the aforementioned statutory provisions. In contrast, the arbitral decision and award issued by Arbitrator Curry construed Section 22.11 within Article 22 of the contract between the parties in effect immediately prior to the contract presently in effect between the parties, the contract which is to be construed in this arbitration proceeding. Arbitrator Curry held that the language of Section 22.11, language which is identical to express language now found within Section 24.11 of Article 24 within the collective bargaining agreement now in effect between the parties, invests in Management the power to

change the work hours of flexible schedule employees to meet the needs of the Employer's treatment programs. Arbitrator Curry ruled, in construing language identical to language within Section 24.11 within the contract before the arbitrator herein, that, "The Union's argument that flex time should not be changed without its consent is simply without merit. Nothing in the language of Article 22, Section 22.11, would lead one to this conclusion."

Arbitrator Curry also held:

Further, whether the Union, Grievant, or Arbitrator believe that the new treatment program along with its required meetings is necessary, or even an improvement over the prior treatment program is irrelevant. That decision is clearly Management's to make. The arbitrator's only authority is to determine whether the State violated the parties' agreement in disciplining and removing the Grievant herein. He concludes that it did not.

The grievance was therefore denied.

While the above described contradictory decisions are based on identical facts, they are not based upon identical authority. It is noted that the decision of the State Employment Relations Board is governed by Ohio statutory provisions which address the obligations of parties within Ohio's system of collective bargaining. The decision of Arbitrator Curry was ruled exclusively by express language found within the contract between the parties. In this regard the arbitrator herein notes language contained within Section 7.07(E) of Article 7 contained within the contract between the parties herein. This provision reads:

Only disputes involving the interpretation, application, or alleged violation of a provision of this agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from, or modify any of the terms of this agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the express language of this agreement.

The authority granted to this arbitrator to fashion a resolution of this matter arises exclusively from the language of the contract between the parties, and the limitation found within Section 7.07(E) of Article 7 of the collective bargaining agreement between the parties is controlling. Nothing within the contract between the parties directs the arbitrator to consider, in fashioning a resolution of this dispute, the provisions utilized by the State Employment Relations Board in coming to its determination. The arbitrator finds that his determination of this matter is to proceed within the confines of the express language of the contract between the parties and this conclusion therefore invests within the arbitration decision and award issued by Arbitrator Curry greater persuasive weight than may be accorded the contradictory determination of the State Employment Relations Board.

While the arbitrator herein is not bound by the previous decision issued by Arbitrator Curry, arbitration by its nature favors consistency with and respect for previous decisions of arbitrators on matters that are analogous to issues under review. Such a philosophy provides finality to the arbitration process and provides comfort to the parties, at least to the extent that they may proceed in their relationship with one another with some level

of certainty that decisions previously made on issues affecting them will be respected and followed. This is not to say that arbitrators may not disagree with previous decisions, however, without compelling reasons to do so, it is the better course to accord decided matters some deference or parties will feel that decided issues may simply be rearbitrated and redecided ad infinitum.

The arbitrator does not intend to imply that the decision of Arbitrator Curry, issued November 7, 1989, is determinative of the proceeding herein. The Union's arguments concerning the disciplinary action allegedly taken against the Grievant in this proceeding must and will be addressed in this decision and award, but to the extent that Arbitrator Curry has answered questions about express language impacting this matter, and to the extent that Arbitrator Curry's analysis on these issues is not found defective by the arbitrator herein, and it is not, the issues determined by Arbitrator Curry in his previous decision and award are found by the arbitrator herein to be persuasive and controlling.

The foundation of the grievance to be determined in this matter rests upon the contention that Grievant Douglas was disciplined by her Employer without just cause. This contention is disputed by the Employer and the determination of this issue, to a great degree, determines the outcome of this proceeding.

It is the opinion and decision of the arbitrator that, based on the evidence presented, the Employer has not imposed disciplinary action upon the Grievant. It is noted that following

the publication of Ms. Douglas's second article within The Ohio Psychologist magazine, disciplinary action was strenuously recommended by psychologists within Ms. Douglas's chain of command for reasons which the arbitrator finds wholly unfounded. The evidence presented, however, reveals that the Employer also found no reasonable basis for imposing the disciplinary action recommended and the Employer's rejection of recommendations for disciplinary action appears within correspondence issued by administrators empowered to make such decisions on behalf of the appointing authority. There appears to be no disagreement between the parties about the basis of the recommendations for disciplinary action against Ms. Douglas as both parties contend that these suggestions arose from professional jealousy. Whether true or not, the record of evidence created in this matter reveals the Employer rejected these suggestions and no disciplinary action resulted from the contentions raised by Drs. Gilbert and Mize that Ms. Douglas was somehow responsible for a biographic sketch appearing within The Ohio Psychologist magazine in which she played no part.

The evidence presented also reflects that the subsequent investigations conducted by the Department into alleged misconduct involving Ms. Douglas, originating in claims by former inmates at the Orient Correctional Institution, were unfounded and revealed no violation of the rules of conduct required of departmental employees. These investigations, however, raised within the Employer a concern about the supervision provided to Ms. Douglas within her employment at the Pickaway Correctional Institution. Such supervisory concerns and the Employer's decisions on how to

satisfy these concerns are the subject of agreed and express language within Article 5 of the contract between the parties which expressly reserves to Management the inherent right and authority to manage and operate its facilities and programs. While it is true that the satisfaction of these supervisory concerns may not be achieved through discrimination or for the purpose of invalidating any contract provision, the arbitrator finds that the evidence does not disclose that the Employer took the actions it deemed necessary to achieve the greater supervisory control it sought through actions which were discriminatory or for the purpose of invalidating any contract provision.

The Union contends that Section 24.11, which provides that the present practice of flex time shall be continued, requires that Ms. Douglas be permitted to continue in her previous flex time schedule without change unless the Union consents to such a change. As stated previously, the language of this article has been the subject of review by Arbitrator Curry in his decision and award issued November 7, 1989. Arbitrator Curry found this argument to be, in his words, "without merit", and found that nothing within this language leads to the conclusion urged by the Union. Arbitrator Curry found that Management clearly had the right to change the schedule of the Grievant to meet the needs of its treatment programs.

As stated previously, the arbitrator is not bound by the determination of Arbitrator Curry on this issue, but finds nothing within the evidence of this case or in the arguments put forth by the parties to contradict this conclusion. The arbitrator herein,

having found that the Grievant was not disciplined by the Employer through changing her schedule, having found that imposing greater supervisory control is within the province of the rights of Management to take such action, having found that in taking such action Management did not discriminate against the Grievant or take the action it did to invalidate other provisions of the contract between the parties, finds that the Employer acted within the authority reserved to the Employer and did not violate the contract between the parties.

AWARD

The grievance is denied.


Howard D. Silver
Arbitrator

November 8, 1991
Columbus, Ohio