ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER 757

OCB GRIEVANCE NUMBER: 29-02-910909-0250-02-12

GRIEVANT NAME: WIKOFF, KAREN

UNION: 1199

DEPARTMENT REHAB SERVICES

ARBITRATOR: FULLMER, JERRY

MANAGEMENT ADVOCATE: EASTMAN, BRIAN

2ND CHAIR: DAUBENMIRE, RICHARD

UNION ADVOCATE: HETRICK, LISA

ARBITRATION DATE: APRIL 15, 1992

DECISION DATE: APRIL 27, 1992

DECISION: DENIED

CONTRACT SECTION AND/OR ISSUES: WAS GRIEVANT ELIGIBLE FOR PROMOTION TO REHAB PROGRAM SPECIALIST 2, PURSUANT TO THE REHAB PROG SPEC CAREER LADDER SIDE AGREEMENT ? THE PARTIES DIFFER ON WHETHER QUALIFICATION IS SET AS HAVING REGIONAL RESPONSIBILITY FOR TWO YEARS OR TWO YEARS IN ANY CAPACITY.

HOLDING: THE "AREA" REFERRED TO IN THE SIDE LETTER IS THE "AREA" WHICH IS THE PRIMARY DELIVERY OF SERVICE. GRIEVANT OPERATES EXCLUSIVELY WITHIN THE NORTHWEST AREA THEREFORE HAS NO "REGIONAL" RESPONSIBILITES AS WOULD ENTITLE HER TO PROMOTION.

COST: $875.27

#757

IN THE MATTER OF ARBITRATION

Between

STATE OF OHIO,
REHABILITATION SERVICES
COMMISSION

The Employer

-and-

OHIO HEALTH CARE EMPLOYEES UNION
DISTRICT 1199, WV/KY/OH
NATIONAL UNION OF HOSPITAL
AND HEALTH CARE EMPLOYEES,
SEIU, AFL-CIO

The Union

OPINION AND AWARD

Karen S. Wikoff
Job Classification
Grievance

29-02-~~09-09-91~~ 910909-250-02-12

APPEARANCES

For the Employer:

Brian Eastman, Esq.
Assistant Legal Counsel

Dick Dzubenmiru, Chief of Operations, OCB
Bruce Mrofka, Manager HR/LR

For the Union:

Lisa Hetrick, Organizer

Karen S. Wikoff, Grievant

JERRY A. FULLMER
Attorney-Arbitrator

Cleveland, Ohio

This case[1] concerns the claim of the Grievant, Susan S. Wikoff, that she should be promoted from a Rehabilitation Program Specialist 1 to a Rehabilitation Program Specialist 2.

I. FACTS

A. Background Facts

The Rehabilitation Services Commission (the "Commission") provides rehabilitative services throughout the State of Ohio. It has a central office in Columbus and serves areas throughout Ohio. For many years there were eight such areas. One of them was Area 3 which consisted of 17 counties in the northwest corner of the State. The Grievant's duties at that time were entirely within Area 3.

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[1] The State of Ohio (hereafter referred to as "the Employer" and Ohio Health Care Employees Union, District 1199, WV/KY/OH National Union of Hospital and Health Care Employees, SEIU, AFL-CIO (hereafter referred to as "the Union"), are parties to a collective bargaining agreement (Jt. Ex. 1) providing in Article 7 for settlement of disputes through a grievance and arbitration procedure. A dispute has arisen between the parties concerning the claim of the Grievant, Susan S. Wikoff, that she should be promoted from a Rehabilitation Program Specialist 1 to a Rehabilitation Program Specialist 2.

The Union's grievance (Jt. Ex. 3a, i.e. # 29-02-09-09-91-250-02-12 concerning this matter was dated September 11, 1991. It was submitted to arbitration before this arbitrator who serves on the parties' permanent arbitration panel. A hearing was held on April 15, 1992 in Room 705 of the Employer's Office of Collective Bargaining in Columbus, Ohio. Both advocates made opening and closing statements and presented and cross-examined witnesses. Because of reservations concerning substantive arbitrability, the Employer was unwilling to stipulate that the grievance was both procedurally and substantively arbitrable; that the time limits in the grievance procedure had either been met or waived and that the arbitrator has been properly chosen and has jurisdiction to hear the case.

Among the classifications of Commission employees are Rehabilitation Program Specialist 1's and Rehabilitation Program Specialist 2's. One of the Rehabilitation Program Specialist 1's is the Grievant Susan S. Wikoff.

The Grievant began her employment with the Commission on January 5, 1977 as a Vocational Rehabilitation Counselor. On January 6, 1985 she was promoted to the position of Employment Manpower Representative. She was reclassified as a Rehabilitation Program Specialist 1 through the Job Audit process, effective January 17, 1987.

In the meantime, during 1986 and 1987 concern arose among the parties concerning the necessity of a career ladder for the progression from Rehabilitation Program Specialist 1 to Rehabilitation Program Specialist 2. Negotiations were undertaken. These proved successful and eventually the parties entered into a "Side Letter" dated September 25, 1987. This letter is quoted in full below, but it essentially provided for the promotion of an Rehabilitation Program Specialist 1 to a Rehabilitation Program Specialist 2 when they met the "qualifications" which were stated to include a graduate degree, service as an Rehabilitation Program Specialist 1 with "regional or statewide" responsibility and two years service as an Rehabilitation Program Specialist 1 subsequent to the date of the "Side Letter".

On January 26, 1989, after she had learned that she was not going to be promoted to a Rehabilitation Program Specialist 2, the Grievant filed a grievance alleging that the Commission had

violated Articles 5,6,40 and the September 25, 1987 Side Letter. The matter went to arbitration before Arbitrator Jonas B. Katz. In a decision dated January 17, 1990, Arbitrator Katz denied the grievance. His opinion was succinct and may be quoted in whole:

> "As I indicatd [sic] at the hearing, I believe that the Arbitrator is powerless to grant grievant her request to be promoted from a RPS 1 to a RPS 2. It is unfortunate, but true, that at the time of the 1986-89 negotiations grievant was not a member of the bargaining unit and the Union was not aware that the negotiated career ladder promotion system would adversely affect the grievant. However the fact remains that grievant does not perform services in more than one area and, therefore, her duties do not come within the negotiated definition of a RPS 2. Nothing in the post hearing submission by the grievant and Union changes my opinion that the state-wide duties alleged in this communication are sufficient to establish that grievant works in more than one regional area as contemplated by the job definition of RPS 2.
>
> Accordingly, the grievance is denied."
>
> (Jt. Ex. 4)

B. Facts Leading to the Grievance

The matter reposed for some six months. Then the Commission, after negotiations with the Union, reconfigured the State into four areas instead of the previous eight areas. A letter dated July 2, 1991, was dispatched from Mr. Bruce Mrofka, Manager, Human Resources/Labor Relations, to Union President Woodruff:

> During the June 28, 1991 Rehabilitation Services Commission meeting the Commissioners voted to adopt a new geographic service delivery configuration for vocational rehabilitation.
>
> The new area configuration divides the state into four Areas: Northwest, Northeast, Southwest and Southeast. ..... The reconfiguration will become effective October 1, 1991 with a one (1) year transition period to permit sufficient time for full implementation by October 1, 1992.

> Enclosed is a map of the current Areas and a map of the reconfigurated areas.
>
> (Joint Ex. 7)

In due course the Grievant began work in the Northwest Area which consisted of some 30 counties in the northwest corner of the State. These counties included all her former 17 counties plus 13 other counties added from the former Areas 2, 4, and 7. The Grievant has at all times since worked "solely in the northwest area".

On September 11, 1991, after it became clear that the Grievant was again not to be promoted to Rehabilitation Program Specialist 2, the Grievant filed the grievance at issue. It stated:

> "On 9/9/91 I was informed by my supervisor, Kathy Peters, in response to my memo dated July 29, 1991 that R.S.C. would not promote me to RPS II as provided for in the RPS career ladder side letter. The 7/29/91 memo is attached. I have been an RPS I for 4 1/2 years; I have the educational requirements and now serve 30 counties of Ohio. This new territory or additional territory gives me responsibility in Areas 3,4, 2 and 7. This responsibility constitutes 'region' which has been defined in RPS Classification Specification Description of D.A.S.. Therefore, the agency is in direct violation of the contract to deny me the career ladder."
>
> Jt. Ex. 3a

The grievance was processed through the steps of the grievance procedure to arbitration.

II. APPLICABLE CONTRACT PROVISIONS

The "Side Letter"

September 25, 1987

....

Dear Mr. Woodruff:

The Rehabilitation Services Commission (RSC) will establish a Rehabilitation Program Specialist Career Ladder for RPS I's with RSC who have regional or statewide responsibility.

The minimum class requirements for an RPS I in RSC are completion of graduate-level coursework in a human service area (i.e. rehabilitation counseling, special education, guidance and counseling, psychology, sociology, social work, child and family community services) as required by an accredited college or related vocational rehabilitation areas (e.g., work evaluation, work adjustment, job placement and rehabilitation management) from an accredited college or university or; a Bachelors Degree from an accredited college or university in a human service area or a related vocational rehabilitation area and three (3) years experience in a position with a private or governmental agency responsible for coordination, development, and evaluation of habilitative and/or rehabilitative programs.

RPS I's in RSC responsible for development and coordination of regional or statewide programs of habilitation and/or rehabilitation, the development of program policies and procedures for assigned programs, and the establishment of program goals, will be promoted to an RPS II after serving a two (2) year period as an RPS I, provided he/she meets the following qualifications:

> 'Graduate degree in a human service area (i.e., rehabilitation counseling, special education, guidance and counseling, psychology, sociology, social work, child and family community services) as required by an accredited college or university; or completion of graduate degree in other related vocational rehabilitation areas (e.g. work evaluation, work adjustment, job placement and rehabilitation management) from an accredited college or university.'

It is understood that only RPS I's with regional or statewide responsibility who meet the minimum qualification for RPS II, including service of a two (2) year period as an RPS I with RSC after the acceptance of this career ladder, will be promoted to an RPS II.

Sincerely,

Eugene Brundige, Deputy Director
Office of Collective Bargaining

(Jt. Ex. 2)

III. STIPULATED ISSUES

Is this matter properly before the Arbitrator, or is the Union estopped from bringing this grievance to arbitration because they failed to bargain over the impact of the reduction from 8 areas to 4 areas at the Rehabilitation Services Commission, and/or because they approved the classification specifications effective 5/6/90 which defined "region" for purposes of the Rehabilitation Specialist Career Ladder.

2. If this matter is arbitrable, is the Grievant, Karen S. Wikoff, eligible for promotion to Rehabilitation Program Specialist 2, pursuant to the Rehabilitation program Specialist Career Ladder Side Agreement dated September 25, 1987? If so, then what shall the remedy be?

IV. POSITIONS OF THE PARTIES

The Union Position

The Union maintains the present grievance is arbitrable because it states a clear claim of violation of the Side Letter. The Employer's position to the contrary is frivolous. On the merits, it is clear that the Grievant has been engaged in "regional" responsibilities. "Regional" is defined in the applicable job descriptions as meaning "more than one geographical

area". The "areas" to which these words have reference are the eight areas which were in effect at the time of the 1987 Side Letter establishing the career ladder.

The Union does not contest that the Employer's management rights gives it the right to change the configuration of the areas. But, those changes cannot infringe upon the Employer's agreements with the Union concerning career ladders. Here the doubling of the size of the "areas" makes it doubly hard for Rehabilitation Program Specialist 1's to achieve responsibilities for more than one area if the Employer's semantic definition is accepted.

The plain fact is that the Grievant has served as an Rehabilitation Program Specialist 1 since January 17, 1987. She has been denied a promotion this entire time. She is now serving as an Rehabilitation Program Specialist 1 with regional responsibilities, i.e. those outside her original Area 3. She has served as an Rehabilitation Program Specialist 1 for well over the required two years. The Side Letter makes no requirement that the regional responsibilities have lasted for two years.

The Grievant should be granted her rightful promotion. The grievance must be sustained.

The Employer Position

The present grievance lacks arbitrability because it is essentially the same one which went before Arbitrator Katz and was decided against the Grievant. The Side Letter states, as Arbitrator Katz held, that a Rehabilitation Program Specialist 1 must be serving in more than one geographical area before the

Rehabilitation Program Specialist 1 is eligible for promotion to Rehabilitation Program Specialist 2. The Employer should not be forced to re-arbitrate the question endlessly and the grievance should be held not to be arbitrable. The Union is estopped from now attempting to get in arbitration that which it failed even to attempt to gain in the negotiations surrounding the reconfiguration.

On the merits, the career ladder is only available for Rehabilitation Program Specialist 1's who have "regional or statewide responsibility....". All of those Rehabilitation Program Specialist 2's have served and do serve in the central office of the Commission in Columbus. This meaning was well understood by the negotiators on both side of the Side Letter. The Grievant has never borne such responsibilities. All her duties have been exercised within only one area, first Area 3 and then the Northwest Area after the 1991 reconfiguration. As such the Grievant is totally unentitled to promotion as a Rehabilitation Program Specialist 2. The grievance must be denied as without merit.

V. DISCUSSION

A. Introduction

As indicated, the Employer challenges the arbitrability of the grievance at hand. Assuming arbitrability, the present case involves for the most part the interpretation of the September 25, 1987 Side Letter quoted above. Two main issues are presented. The first is whether the expansion of the Grievant's "Area" from the original 17 county "Area 3" to the present 30 county "Northwest

Area" necessarily means that she was thereafter exercising "regional" responsibilities in "more than one geographical area". A second issue is, assuming that the Grievant is exercising regional responsibilities, whether the Grievant must have exercised them for more than two years before she is eligible for promotion.

We turn to the issues in the stated order.

B. Arbitrability

It is clear from the discussion at the hearing that the Employer's argument on arbitrability is based upon substantive rather than procedural arbitrability. The subject of substantive arbitrability has arisen previously in cases between the same two parties before this arbitrator.[2] The following comments were made by the arbitrator at that time:

> "1. The Applicable Standard
> The applicable standard on questions of substantive arbitrability has been stated by one commentator in the following terms:
>
> > 'the prevailing view among arbitrators appears to be that a grievance claim will be considered within their jurisdiction if based upon an alleged violation of the agreement and involving an issue not completely foreign to the traditional scope of labor agreements and arbitration....' Fairweather, Practice and Procedure in Labor Arbitration (2d Ed., BNA, 1983) p. 131
>
> Sometimes parties expressly exclude certain subjects such as subcontracting, job evaluation or work standards from

[2] State of Ohio, Bureau of Workers' Compensation and District 1199, Fred L. Butler and Charles L. Mack "State Seniority" Grievance 34-00-900720-0105-02-12. Opinion and Award dated February 5, 1991.

the operation of the grievance procedure. In that case the only difficulty is in ascertaining whether the grievance at issue is one involving the forbidden subjects.

In most cases though, the quoted principle is more easily stated than applied. There is a constant danger that the question of substantive arbitrability will become entangled with the question of which party is entitled to prevail on the merits.

Similar "entanglement" problems are faced by courts in deciding whether to compel arbitration of particular issues:

> 'In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad. Since any attempt by a court to infer such a purpose necessarily comprehends the merits, the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator.' United Steelworkers of America v. Warrior and Gulf Navigation Company 363 U.S. 574, 584 (1960) (emphasis added)[3]

2. The Application of the Standard in the Present Case

Controversies as to the accumulation of seniority under various circumstances are, of course, quite common in arbitration. Here the grievance from its filing has claimed that the Employer violated Section 28.01 A. and F. by not giving the Grievants credit for the periods they were laid off in 1982 (Butler) and 1982/83 (Mack). Section 28.01 A. provides for the credit of "continuous service .... dating back to the first date of hire." and Section 28.01 F. provides that continuous service is to be interrupted only by separations, discharges, failure to return from a leave of absence and failure to respond to recall from layoff.

The layoff periods in question did pre-date 1986, the year in which the Employer entered into its labor

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[3] Cited as an example of the "entanglement" problem rather than as to the applicable standard of review.

> agreements with the Union and OSCEA. But, that alone is not sufficient to resolve the substantive arbitrability controversy. Employees in commerce, industry and government quite often carry seniority dates which pre-date the organization of their employer by a union. Both parties agree that such is the case under their agreement because both Grievants have been credited with continuous service for periods pre-dating 1986.
>
> The dispute between the parties is as to how much of such pre-1986 service the Grievants should be credited with. The Union claims it should include the lay off periods, the Employer claims it should not. As is to be expected, each side has reasons for its position, with citations to the provisions of Article 28, to the "side letter" (Jt. Ex. 2) and provisions of the Ohio Revised Code. But, all these arguments go to the merits of the dispute not to the issue of substantive arbitrability."

Much the same considerations are present here as in the Butler/Mack case from which the quotation above is taken. The Union has cited a Side Letter dated September 25, 1987 as the basis of its grievance. The Union claims the letter has been violated and the Employer denies any violation. Such is the grist which the arbitration mill grinds.

It is clear that the decision of Arbitrator Katz is not res judicata of the matters here at issue. The reason is that the change in the configuration of the areas, upon which the Union heavily relies, took place six months after Arbitrator Katz made his decision and, obviously, could have played no part in his decision.

To sum up, the "entanglement" problems alluded to by the present arbitrator in the Butler/Mack case are equally present in this case. Absent a clear exclusion in the contract of a particular subject from arbitration the arbitrator is not inclined to sustain a substantive arbitrability defense. There is no such exclusion in

the present case and the arbitrator finds the grievance to be substantively arbitrable. We turn to the merits.

C. Did the Expansion of the Grievant's "Area" From the Original 17 County "Area 3" to the Present 30 County "Northwest Area" Necessarily Mean That She Was Thereafter Exercising "Regional Responsibilities in "more than one geographical area"?

The last paragraph of the Side Letter (Jt. Ex. 2) provides that it is only Rehabilitation Program Specialist 1's "with regional or statewide responsibility" who are entitled to promotion to Rehabilitation Program Specialist 2. There is no argument about this and the Union concedes that the Employer had the management right to change the "areas" in 1991. Neither is there any argument but that the definition of "regional responsibility" is that contained in the job descriptions, i.e. that of "more than one geographical area".

Clearly the Grievant did not have "regional responsibility" prior to the 1991 reconfiguration. Arbitrator Katz's award of January 17, 1991 is res judicata on that subject.

The question is whether the "more than one geographical area" language refers solely to the "areas" as they were in existence at the time of the Side Letter on September 25, 1987 (the Union view) or whether the language refers to the "areas" as they might be subsequently amended from time to time by the Employer (the

Employer view). It seems to the arbitrator that this question must be answered in a rather common sense fashion. Changing area boundaries, splitting areas and combining areas are among the most common exercises of governmental management discretion. It cannot have been within the contemplation of the parties to the Side Letter that the boundaries of the eight areas were to remain inviolate for all time. The career ladder to Rehabilitation Program Specialist 2 was apparently established to see to it that those Rehabilitation Program Specialists whose duties transcended the primary-delivery- of-services area were rewarded with the higher classification. The Grievant's problem is that her duties have never transcended the primary-delivery-of-services area in which she is resident. All that has happened is that area has gotten larger.

This is consistent with the testimony of Bruce Mrofka, the Commission's Manager of Human Resources and Labor Relations. Mr. Mrofka was involved in the negotiations which preceded the Side Letter. He indicated that the Rehabilitation Program Specialist 2 classification was discussed in terms of applying essentially to a cadre of Rehabilitation Program Specialist 2's working out of the central office in Columbus. All but two of these were occupied with statewide responsibilities. The two with "regional" responsibilities were grant writers who had essentially divided the State in half between themselves for the purposes of grant writing. According to Mr. Mrofka these concepts of the Rehabilitation Program Specialist 2's were discussed with his counterpart from the

Union and there was no disagreement from the Union on these concepts. The Union was at a disadvantage in rebutting Mr. Mrofka's testimony in that the Union counterpart has since retired and moved out of state. Nevertheless, the arbitrator must take the evidence as it unfolds at the hearing and there was in effect, no evidence rebutting that of Mr. Mrofka.

On the basis of the language of the Side Letter, the setting of the negotiations and the evidence of bargaining history, it appears to the arbitrator that the "area" referred to in the Side Letter is the "area" which is the primary delivery of service area as it may be reconfigured from time to time. This is presently the Northwest Area. The facts indicate that the Grievant operates exclusively within this Area. There is accordingly no reason to conclude that she has any "regional" responsibilities as would entitle her to promotion to Rehabilitation Program Specialist 2.[4]

D. The "Two Year" Requirement.

The parties differ on whether the qualification set out in the Side Letter is two years service as a Rehabilitation Program Specialist 1 with regional or statewide responsibility for the

[4] This conclusion is, of course, based solely on the facts present in this case. The Union will remain free in any future cases to make the argument that any further expansions of the "areas" have been such as to totally dilute the possibility of any "regional" assignments. Also, nothing in this Opinion and Award should be read as constituting any holding on the subject of "areas" for layoff and recall questions. The arbitrator considers that to be another subject entirely and one not involved in the present case.

entire two years (the Employer view) or is only for two years service as a Rehabilitation Program Specialist 1 in any capacity, provided that the Rehabilitation Program Specialist 1 has regional or statewide responsibility at the time he/she seeks promotion (the Union view). In view of the conclusion reached above, i.e. that the Grievant is not currently exercising regional or statewide responsibility, this issue is academic and need not be reached in this case.

VI. AWARD

Grievance denied.

Jerry A. Fullmer, Arbitrator

Made and entered this
27th day of April, 1992
at Cleveland, Ohio