STATE OF OHIO
LABOR ARBITRATION TRIBUNAL

IN THE MATTER OF THE ARBITRATION BETWEEN:

State of Ohio, Office of Collective Bargaining and the Department of Mental Health,

Employer,

-and-

OPINION AND AWARD

District 1199, The Health Care and Social Service Union, SEIU, AFL-CIO,

Union.

Case No. 23-12-911212-0289-02-11
Case No. 23-12-911218-0292-02-11

Appearances: For the Employer -- Michael Duco
For the Union -- Tom Woodruff

LAYOFF OF MARY FRAKER, KATHLEEN RECKER AND SHIRLEY ZIMMERMAN

ISSUE

The parties stipulated to the issue at the hearing. It is as follows:

> Did the Employer violate Article 29 of the collective bargaining agreement when it conducted the layoffs of Mary Fraker, Kathleen Recker and Shirley Zimmerman from their positions of Psychiatric/MR Nurse Coordinator with the Oakwood Forensic Center?
>
> If so, what shall the remedy be?

The issue arose out of two class action grievances filed by the Union on December 12, 1991 and December 18, 1992. (Joint Exhibit No. 3)

The first one appears to read as follows:

"Statement of Grievance. Abolishment of PS/MR Coordinators will effect service delivery to patients.

Contract Article(s) and Section(s). Article 29.02, Article 33, Article 32.11, Article 39 and others.

Resolution Requested. To be placed back into PS/MR Nurse Coordinator position and made whole in every way."

The second one appears to read as follows:

"Statement of Grievance. Displacement of position by PS/MR Coordinators will effect service delivery to patients. Positions affected are PS/MR Nurses.

Contract Article(s) and Section(s). Article 29.02, Article 33, Article 32.11, Article 39 and others.

Resolution Requested. To be placed back into PS/MR Nurse position at Oakwood Forensic Center and be made whole in every way."

There was a grievance meeting on February 5, 1992. At that time, the Union amended the grievances by adding Article 6 to its list of contractual articles and sections that were allegedly violated by the Employer.

The grievances unquestionably involve ARTICLE 29 - LAYOFF AND RECALL, Section 29.01 Notice, first paragraph, of the collective bargaining agreement. (Joint Exhibit No. 1) That contractual provision reads as follows:

> When the agency determines that a layoff is necessary, the agency shall notify the Union and inform them of the classification(s), the number of employee(s) and the worksite(s) affected. When the layoff involves a worksite with more than one (1) employee in a classification series, the layoff shall be within the entire classification series.

The grievances also involve some parts of ARTICLE 29 - LAYOFF AND RECALL, Section 29.02 Layoff Procedures (C) of the labor contract. (Joint Exhibit No. 1) In pertinent part, that contractual provision reads as follows:

"Employees with the least state seniority within the classification series at the worksite(s) affected shall be laid off first.

* * *

. . . A laid off employee shall have the right to displace an employee of another worksite within their bumping jurisdiction provided that the employee to be bumped has the least state seniority within the classification series at their worksite and has less state seniority than the employee originally laid off. . . ."

STATEMENT OF THE CASE

The determination of the issue involves, inter alia, a recognition of certain facts as they existed in December of 1991. The pertinent facts appear to be as follows:

1. The Oakwood Forensic Center is an institution within the Ohio Department of Mental Health (hereinafter sometimes referred to as "ODMH" or the "Department"). It is located in Lima, Ohio.

2. The Department decided to layoff some employees at the Oakwood facility. Specifically, the ODMH stated that it would layoff three Psychiatric/MR Nurse Coordinators. The notices were in December of 1991. They were to be effective in March of 1992.

3. Ms. Mary Fraker, Ms. Kathleen Recker and Ms. Shirley Zimmerman were the three junior Psychiatric/MR Nurse Coordinators. These three women were notified of the impending layoff.

4. Ms. Susan Long and Ms. Cheryl Point were Psychiatric/MR Nurses. They had less seniority than Ms. Fraker and Ms. Recker.

5. Ms. Recker displaced Ms. Long. Then, Ms. Long resigned on February 28, 1992 -- a date prior to the effective date of the layoff.

6. Ms. Fraker displaced Ms. Point. So, Ms. Point was laid off on March 12, 1992.

7. Ms. Zimmerman was laid off on March 9, 1992.

8. Ms. Recker was recalled to the position of Psychiatric/MR Nurse Coordinator on July 6, 1992. She declined the recall on July 14, 1992.

9. Ms. Fraker was recalled to the position of Psychiatric/MR Nurse Coordinator on July 24, 1992. She declined the recall on August 5, 1992.

10. Ms. Zimmerman was recalled to the position of Psychiatric/MR Nurse Coordinator on August 6, 1992. She accepted and returned to active duty on August 23, 1992.

11. Psychiatric/MR Nurse is a classification. Psychiatric/MR Nurse Coordinator is a classification. Psychiatric/MR Nurse and Psychiatric/MR Nurse Coordinator together are a classification series.

12. The Department has five layoff jurisdictions. One of those jurisdictions, i.e., #3, includes only two facilities, i.e., Oakwood Forensic Center and Toledo Mental Health Center.

UNION POSITION

The Union believes that the pertinent language in ARTICLE 29 is clear and unambiguous. It clearly provides that the Employer must layoff the most junior employees in a specific classification series -- not in a classification. Therefore, the Employer should have laid off Ms. Zimmerman, Ms. Point and Ms. Long. Ms. Fraker and Ms. Recker should not have been demoted from Psychiatric Nurse/MR Coordinator (pay range 14) to Psychiatric/MR Nurse (pay range 13).

Since the language is clear and unambiguous, the arbitrator should not look to the bargaining history of the specific contractual provisions involved in the case at bar. However, even if the arbitrator does look at the bargaining history, he should still conclude that the agency's actions in this layoff were inappropriate. The Union intended to negotiate language that prevented multiple pay reductions. Further, employees, who are about to be laid off, only have a right to bump certain employees at another worksite within their bumping jurisdiction -- not employees at the same worksite.

In short, the agency must lay off the least senior employees in a classification series at a worksite. Then, those employees may elect to be laid off or bump the most junior employees at another worksite within their bumping jurisdiction.

EMPLOYER POSITION

The State believes that the language in ARTICLE 29 is ambiguous. Therefore, the arbitrator should look to parol evidence concerning the bargaining history of this language to determine the intent of the parties. It also urges reliance on four rules of construction: (a) agreements are to be construed as a whole; (b) agreements are to be construed to give effect to all clauses and words; (c) agreements are to be construed to avoid harsh, absurd or nonsensical results; and (d) agreements are to be construed to avoid a forfeiture.

The language of ARTICLE 5, ARTICLE 29 and ARTICLE 38 creates an ambiguity. Therefore, the intent of the parties may be determined by the use of parol evidence. The bargaining history shows that the parties agreed that there would only be one bump within the institution or worksite. The employee, who was about to be laid off, was forced to bump the least senior employee in the institution. Then, there would be one additional bump within the district. The pertinent language was drafted by the Union. The State should not be penalized for the sloppy draftsmanship involved in the case at bar.

Furthermore, Ms. Recker had an opportunity to be recalled as a Psychiatric/MR Nurse Coordinator. She declined this opportunity on July 14, 1992. Ms. Fraker had an opportunity to be recalled as a Psychiatric/MR Nurse Coordinator. She declined this opportunity on August 5, 1992. These facts should be considered in mitigation of damages. The grievants had a duty to mitigate damages. They breached that duty when they declined these recalls to their former classification.

DISCUSSION

The language is not ambiguous. Therefore, the law is clear. There is a basic and well-established rule of statutory construction in Ohio. If the language of the statute is plain and free from ambiguity, and expresses a single definite and sensible meaning, that meaning is conclusively presumed to be the meaning which the legislature intended to convey. In other words, the statute must be interpreted literally. Dollar Sav. Bank Co. v. Barberton Pottery Co., 17 Ohio Dec. 539, 5 Ohio N.P., N.S., 73 (1907) That rule is applicable to the case at bar.

The language in ARTICLE 29, Section 29.01, first paragraph, first sentence, clearly states that the agency must notify the Union of the classifications, the number of employees and the worksites involved in a layoff. The second sentence in that paragraph clearly states that the layoff must be within the entire classification series -- not just the classification. The language in ARTICLE 29, Section 29.02 (C), first paragraph clearly provides that the most junior employee in the classification series will be the first employee to be laid off. The language in ARTICLE 29, Section 29.02 (C), second paragraph, second sentence allows the laid off employees, in some circumstances, to bump certain employees at another worksite within their bumping jurisdiction.

The three most junior employees in the classification series were Ms. Zimmerman, Ms. Long and Ms. Point. When the Department decided that it was going to layoff three employees in this classification series, it should have notified these three employees. It did not do so. It only notified one of the three, i.e., Ms. Zimmerman. The ODMH violated the collective bargaining

agreement when it notified Ms. Fraker and Ms. Recker that they would be laid off. It should have notified Ms. Long and Ms. Point.

It is axiomatic that the correct three employees were laid off. But, this result was accomplished by a rather circuitous procedure. Ms. Recker bumped Ms. Long. Ms. Fraker bumped Ms. Point. In the process, these two Psychiatric/MR Nurse Coordinators incurred a reduction in pay as they ended up being Psychiatric/MR Nurses. This reduction in pay is violative of the collective bargaining agreement. The language in ARTICLE 38(B), third paragraph, second sentence, indicates that an employee will not suffer a reduction in pay when that employee performs duties in a lower pay range than the employee's current classification. In short, Ms. Recker and Ms. Fraker should have maintained their status of Psychiatric/MR Nurse Coordinators. If the ODMH wanted them to perform some, or all, of the duties of a Psychiatric/MR Nurse, it could make these assignments. However, the Department could not reduce their pay.

The Department allowed Ms. Recker and Ms. Fraker certain bumping rights at the Oakwood facility. An ODMH witness testified that these rights exist pursuant to ARTICLE 29, Section 29.02 (C), second paragraph. This language is not susceptible of that interpretation. The clear language in that contractual provision only allows bumping rights at another worksite within the laid off employee's bumping jurisdiction. It does not allow bumping rights at the same worksite. In summary, a laid off employee at Oakwood may have some bumping rights at the Toledo facility; but, this laid off employee does not have any bumping rights at the Oakwood facility.

The Employer has referred to several rules of statutory construction. Those rules are the law in Ohio. There are several good cases that establish these legal points. It is clear that words and phrases in a statute must be read in context of the whole statute. Commerce & Industry Ins. Co. v. City of Toledo, 543 N.E. 2d 1188, 45 Ohio St. 3d 96 (1989). It is a fundamental rule in construing a statute that all parts of it must be construed together and any apparent contradictions reconciled, if possible. Blackwell v. Bowman, 80 N.E. 2d 493, 150 Ohio St. 34 (1948). It is a basic rule of statutory construction that words should not be construed to be redundant, nor should any words be ignored. East Ohio Gas Co. v. Public Utilities Commission of Ohio, 530 N.E. 2d 875, 39 Ohio St. 3d 295 (1988). There is a salutary rule of statutory construction that whenever possible, each provision of a legislative enactment is to be interpreted as meaningful and not as surplusage. Laufman v. Oakley Bldg. & Loan Co., 408 F. Supp. 489 (S.D. Ohio, 1976). It is presumed that the General Assembly does not enact laws producing unreasonable or absurd consequences. Superior's Brand Meats v. Lindley, 403 N.E. 2d 996, 62 Ohio St. 2d 133 (1980); Canton v. Imperial Bowling Lanes, 16 Ohio St. 2d 47 (1968). A statute, which provides for a forfeiture, must be

strictly construed because forfeitures are not favored in law or equity. State v. Abboud, 500 N.E. 2d 350, 27 Ohio App. 3d 209 (1985).

The above rules do not lead to the conclusion that ODMH advocates in the case at bar. The Department seems to believe that there is some ambiguity between ARTICLE 5, Sections 29.01 & 29.02 and ARTICLE 38. That ambiguity does not exist.

It is clear that ARTICLE 5 and O.R.C. Sec. 4117.08(C) contain words of limitation. They are applicable only if those management rights are not "modified by this Agreement" or the employer "agrees otherwise in a collective bargaining agreement." Of course, the Employer did agree otherwise and it did modify its management rights when it agreed to the language in ARTICLE 29. Therefore, the management rights provision does not create any ambiguity or lead to any different conclusion. Also, in ARTICLE 38, the Department clearly agreed to contractual language that allows an employee to perform duties in a lower classification without any reduction in pay. It is not ambiguous. Furthermore, there aren't any absurd results or forfeitures. The results are the results that the parties negotiated in collective bargaining and wrote into their collective bargaining agreement. These rules of construction do not lead to the conclusion that ODMH could layoff Ms. Fraker and Ms. Recker or reduce their pay as occurred in the case at bar.

There is a duty to mitigate damages. Cleveland Pneumatic Co. 89 LA 1071(1987). It is clear that two of the grievants did not fully comply with this duty. It does not exist as to Ms. Zimmerman. Ms. Recker and Ms. Fraker declined recalls to Psychiatric/MR Nurse Coordinator. There wasn't any evidence presented that the recalls were unreasonable or inappropriate in any way. Therefore, it would appear that they were classified as Psychiatric/MR Nurses by choice after the date of each grievant's declination. Consequently, Ms. Recker is entitled to the difference in pay that she would have received as a Psychiatric/MR Nurse Coordinator and which she did receive as a Psychiatric/MR Nurse from March 8, 1992 through July 14, 1992. Ms. Fraker is entitled to the difference in pay that she would have received as a Psychiatric/MR Nurse Coordinator and which she did receive as a Psychiatric/MR Nurse from March 8, 1992 through August 5, 1992.

AWARD

The grievance is sustained. The Employer violated ARTICLE 29 of the collective bargaining agreement when it laid off Ms. Recker and Ms. Fraker on March 8, 1992. These two grievants are entitled to the difference in pay that they would have received as a Psychiatric/MR Nurse Coordinator and which they received as a Psychiatric/MR Nurse from the date of the layoff until the date that they declined recall to their former position.

The arbitrator will maintain continuing jurisdiction. If the parties are unable to agree on the backpay calculations, either party may ask the arbitrator to hear and decide the dispute so that this award may be appropriately implemented.

Signed, dated and mailed this 18th day of March, 1993.

Richard E. Gombert

Richard E. Gombert, Arbitrator