1010

VOLUNTARY ARBITRATION PROCEEDINGS
CASE NO. 28-01-(10/1/92)-53-02-12

STATE OF OHIO	:	
	:	
The Employer	:	
	:	
-and-	:	OPINION AND AWARD
	:	
SEIU DISTRICT 1199	:	
	:	
The Union	:	

APPEARANCES

For the Employer:

Joe Shaver, Chief, Bureau of Labor Relations
Department of Rehabilitation and Correction
Colleen Wise, Office of Collective Bargaining
Labor Relations Specialist
Bernie Susko, Department of Rehabilitation and Correction-
Adult Parole Authority-Akron District Office

For the Union:

Robert Cox, Advocate
Vickie Sensenstein, Grievant
Davida Bhaerman, Observer
Thelma Cohagen, Executive Organizer
Richard Gill, Witness
Joseph Solitro, Witness

MARVIN J. FELDMAN
Attorney-Arbitrator
1104 The Superior Building
815 Superior Avenue, N.E.
Cleveland, Ohio 44114
216/781-6100

I. SUBMISSION

This matter came before this arbitrator pursuant to the terms of the collective bargaining agreement by and between the parties, the parties having failed resolve of this matter prior to the arbitral proceedings. The hearing in this cause was scheduled and conducted on October 5, 1994, at the conference facility of the employer, Columbus, Ohio, whereat the parties presented their evidence in both witness and document form. The parties stipulated and agreed that this matter was properly before the arbitrator; that the witnesses should be sworn but not sequestered and that post hearing briefs would not be filed. It was upon the evidence and argument that this matter was heard and submitted and that this opinion and award was thereafter rendered.

II. STATEMENT OF FACTS

The facts in this case are not in substantial dispute. An employee by the name of Meers retired from his Portage County position with the employer. The supervisor of Meers issued a memorandum dated September 30, 1992, stating that an employee by the name of Dauphars would be covering the retirees workload. In other words, the position of Meers was not posted and Dauphars was assigned. Another person was not added to the office from which Meers retired. Dauphars had previously handled some of the workload that Meers had handled. Now he, by way of memoranda, would take over the entire workload of Meers. There was no posted vacancy posted for the position that Meers held. The office from which Meers retired resulted in one less person being assigned to it.

In view of that, a timely protest was filed and that protest stated as follows:

"Statement of Grievance Management improperly filled the vacancy in Portage County."

The contract articles and resolution requested revealed the following:

"Contract Article(s) and Section(s) Articles 30.01 30.02, 28.01, 28.02, 28.05, 'And all others that apply',

Resolution Requested Management to properly fill vacancy in Portage County and to be made whole in every way."

Management by way of answer at step 3 stated as follows:

"Discussion:
The grievants argue that when P.O. Meers retired management sent a memo advising that P.O. Dauphars would be assuming a portion of the workload of retired Meers. It is their contention that the three grievants all have greater seniority than P.O. Dauphers and the most senior should have been selected to assume the caseload in Portage County. It is the Union's contention that Management placed the Parole Officers into Portage County that they wanted in Portage County because the P.O. assigned had gone around prior to the move indicating that he was going to get the Portage County work because it had been promised to him. It is the Union's further contention that management had nothing to lose by assigning the senior person to the Portage County caseload.

In the opinion of the Hearing Officer, it is management's right to determine whether a vacancy exists or not or whether to fill that vacancy. Evidence of management's intent to fill a vacancy is prescribed by a posting. Instead of posting the position left by Meers retirement, management determined that the position was needed more in Mahoning County than in Portage County and therefore moved the position and PCN number to Mahoning County. As a result of this, the Union had no right to any position, posting, or bidding for the vacant position in Portage County. The Union wishes to argue a pull and move situation

but failed to cite article 24.18 in their grievance. It is management's contention that a pull and move situation did not exist, that management has the right to assign caseloads to whomever it feels is necessary. It is management's position that if Parole Officers are permitted to bid on caseloads, that there could never be an adequate control of the assignment of cases.

Therefore, on the basis of the above, management has exercised its management right and the grievance is denied."

The pertinent part of article 30 revealed the following:

"ARTICLE 30 - VACANCIES

30.01 Job Vacancies

A vacancy is defined as an opening in a full-time permanent or part-time permanent position in the bargaining unit which the agency has determined is necessary to fill. (Emphasis ours)

When a vacancy is created by an incumbent employee leaving the position, and that incumbent is above the entry level position in the classification series, the job shall be posted at the level in the classification series of the leaving employee, provided the duties and responsibilities remain the same. After the employees have had the opportunity to bid for lateral transfers or for promotions, the position can be reduced in the classification series.

When a vacancy will be created by an incumbent employee leaving a position, the agency may post the vacancy and interview and provisionally select a candidate anytime after receiving notice that the position will be vacated."

It might be noted that the union argued that once an opening is created by virtue of an incumbent employee leaving a position by way of retirement, that management must fill that position or vacancy automatically by posting and bidding, pursuant to the contract.

Management on the other hand took the view that article 5, i.e., the Management Rights Clause reserved to the employer all of the inherent rights and authority to manage and operate the facilities and programs of the facility subject to the terms of the contract. Management also believed that it had the right to determine whether a vacancy or not existed. Thus on one hand there was an indication by the union that an assignment to a workload previously accomplished by a retiree cannot be made by the employer and on the other hand the employer has taken the view that the workload of Meers, created by his retirement was properly assigned because the retiree's work slot was to be left open. Therefore, an assignment of Meer's duties to another in the bargaining unit was not contrary to the terms of the contract.

It might be noted that concomitant with the downsizing of staff in Akron by not replacing Meers, the employer added another person to the Youngstown staff. The same district was involved. The reason for the adding to the Youngstown staff was that the workload per capita was now higher in Youngstown and therefore the Youngstown office needed some assistance. The union's argument indicated and stated that the arbitrator has jurisdiction to order a staffing in Youngstown by way of bidded award. However, it is noted in the grievance form itself that is stated in full hereinabove that the statement of the grievance only directed its attention to management allegedly improperly filling the vacancy in Portage County. Mahoning County is not indicated on the face of the protest and the undersigned will not take jurisdiction over something that is not reached in the four corners of the protest. The union may of course pursue that separately from the filings herein pursuant to the terms of the contract, but jurisdiction in this case was

not conferred on the arbitrator concerning the Youngstown situation.

Also placed into evidence in this case were two opinions by Arbitrator Howard Silver. Those opinions by way of exhibit, were both reviewed. In one of the cases there was a total reorganization involved in the fact pattern and the arbitrator in that case and in that regard stated such in the following paragraph:

> "In this matter, the Akron Region underwent significant change. Positions were created, positions were deleted, and geographic and substantive duties attached to positions have, in certain circumstances, been significantly altered."

The second Silver decision decided an issue of a reassigned position. That reassigned position was ordered to be posted under the bidding procedures under the then current contract of collective bargaining. It might be noted that the instant case is not a general reorganization and the instant case is not a grievance filed with an issue to be decided about a reassignment. This is a case about a replacement of an employee who retired.

It was upon all of those facts that this matter rose to arbitration for opinion and award.

III. OPINION AND DISCUSSION

Let me indicate and state at the outset that Arbitrator Silver's decisions are not dispositive of the issues at hand. In one instance the Silver dispute reached a general reorganization issue and certainly the instant case is not that type of matter. In the second Silver case,

a reassignment issue and question occurred. The grievance in this particular cause only reached the issue of whether or not an automatic vacancy occurred when a resignation occurred. Thus, while those Silver decisions are part of the jurisprudence between the parties, those particular decisions have little impact to the matter at hand. Simply put the issue of the current case is substantially different than those of the Silver cases.

The important thought in this particular matter is that the employer did not find it necessary to replace Meers at the site that he was working. While a vacancy under the contract is defined as an opening, the employer has the right to determine if a vacancy actually exists. In this particular case the employer determined that a successor to Mr. Meers was not needed and that in fact there was no vacancy. A study was made to determine the workload of the people involved in Akron and it was determined that they were not overworked. That was true even with the reassignment of the cases of the retired Meers. That being the case, the union could hardly dictate and state that a vacancy should be automatically posted. No new person was hired. No new personnel were taken in off the street and there were no supervisors accomplishing the workload. The evidence did not reveal anything to the contrary.

The union cited several contractual clauses as a predicate for this protest but the only important clause involved in all of this is the first several paragraphs of article 30, which is stated hereinabove.

It is clear that the actions of management were clearly within the

retained rights of management as indicated under the four corners of the agreement both being the management rights clause as well as by the first few paragraphs of article 30. An automatic vacancy does not exist when an employee retires. The employer may reassign a workload under the conditions that took place in the instant case. From all of that, the grievance must be denied.

One interesting thought in this particular matter is that it is true that those who protested had greater seniority than the person to whom the workload of the retiree was reassigned. The fact of the matter is, that an employee has no right to bid for a certain case load under any circumstance. In an industrial facility that is also true. An employee may bid for a working slot such as parole officer two or three but cannot bid to handle certain types of case loads. That is true unless there is contract language to the contrary and none appears in the instant contract, as I can determine. For all of these reasons the grievance must be denied.

IV. AWARD

Grievance denied.

MARVIN J. FELDMAN, Arbitrator

Made and entered
this 14th day
of October, 1994.

10/17/94