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September 24, 1996

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Grant D. Shoub, Esq.
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Dear Advocates:

Here is my arbitration decision in connection with SCOPE/OEA and Susan May, et al Grievant versus Ohio Department of Mental Retardation and Developmental Disabilities.

Case Number, Hearing Date and Location: Case 24-01-950615-0134-06-10
5/1 - 5/3, 5/21 & 7/23/96 OCB & Columbus Developmental Center, Columbus, Ohio

Thank you for demonstrating the highest professionalism throughout the proceedings.

Warm regards,

Dr. Everette J. Freeman

enclosure

In the Matter of Arbitration Between STATE COUNCIL OF PROFESSIONAL EDUCATORS, OHIO EDUCATION ASSOCIATION/NATIONAL EDUCATION ASSOCIATION (SCOPE/OES), On Behalf of Susan May, et al - And - STATE OF OHIO DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES	OPINION and AWARD Everette J. Freeman, Arbitrator Case # 24-01-950615-0134-06-10 Susan May, et al Grievant **REDUCTION-IN-FORCE**

Pursuant to the procedures of the parties hearings were conducted in Columbus, Ohio, on May 1, 2, 3, 21, and July 19, 1996 before Everette J. Freeman, Arbitrator. The parties agreed to the jurisdiction of the Arbitrator for a determination of the issue presented. The parties were given a full opportunity to present written evidence and documentation, to examine and cross examine sworn witnesses, to argue their respective positions during closing oral statements, and to present post-hearing briefs. The Record of this proceeding was subsequently closed upon receipt by the Arbitrator of both post-hearing briefs on August 22, 1996; and, this matter is now ready for final resolutions herein.

The case for the Employer was presented by Georgia M. Brokaw, Operations Team Leader, State of Ohio, Department of Administrative Services, Office of Collective Bargaining. The case for the Union was argued by Grant D. Shoub, Esq., Cloppert, Portman, Sauter, Latanick & Foley on behalf of SCOPE/OEA.

WITNESSES

Witnesses on behalf of the Employer were:

Fred Williams, Ass't Deputy Director, MRDD Division of Developmental Centers & Supt., Montgomery Developmental Center;

Kim Linkinhoker, Chief of the Office of Adult Services;

Gail Lively, Administrator, Department of Administrative Services, Classification & Compensation Section;

Barbara Ritter, Program Director, Mount Vernon Developmental Center;

Laurie Hankins, Human Resources Director, Mount Vernon Developmental Center;

Corey Schultz, Program Director, Tiffin Developmental Center;

Eric Young, Program Director, Gallipolis Developmental Center;

Michael Snow, Supt., Apple Creek Developmental Center;

Ed Ostrowski, Chief of Labor Relations, MRDD;

Dan Housepian, Program Director, Northwest Ohio Developmental Center;

Cheryl Webster, Program Director, Apple Creek Developmental Center.

Witnesses on behalf of the Union were:

Kathryn Meitzler, Vocational Habilitation Specialist 1, Apple Creek Developmental Center;

Frank Croskey, unemployed, formerly at Apple Creek Developmental Center;

Dr. Marion Stroud, former Head of Education Services, Apple Creek Developmental Center;

Vera Wood, Vocational Habilitation Specialist 1, Applecreek Developmental Center;

Alice Coffman, former teacher, Tiffin Developmental Center;

Diane Moore, former teacher, Tiffin Developmental Center;

Donna Lynds, Mount Vernon Developmental Center;

Susan May, Grievant, Mount Vernon Developmental Center.

ISSUE

The parties, by means of joint written stipulation, assert that the issue before the Arbitrator is as follows:

"Was the reduction in force conducted by the Ohio Department of Mental Retardation and Developmental Disabilities in its Developmental Centers located in Apple Creek, Gallipolis, Montgomery, Mount Vernon, Northwest and Tiffin in accordance with Article 18 of the State of Ohio and SCOPE/OEA collective bargaining agreement? If not, what shall the remedy be?"

STIPULATIONS OF FACTS

1. The grievance at issue is timely filed by SCOPE/OEA. Any and all procedural objections raised by the Employer as to timeliness and procedural arbitrability have been withdrawn. The matter is properly before the Arbitrator for a decision on the merits.

2. The Employer and SCOPE/OEA met on June 1, 1995, 45 days prior to the effective date of the Reduction in Force.

3. The Employer met with SCOPE/OEA on June 9, 1995 in accordance with Article 18.01 A where the Association was given the opportunity to challenge the rationale and offer suggestions.

4. The final decision of the Employer to effect a Reduction in Force was communicated to the Association in its letter to Henry Stevens dated June 14, 1995 and received by the Association June 15, 1995.

5. The effective date of the reduction in force was July 16, 1995.

6. Kevin Creamer, a teacher at Tiffin Developmental Center, was not affected by the RIF.

7. Linda Payne, the sole affected Teacher at Montgomery Dev Center, resigned effective 8/25/95.

8. Mary Broadnax, an affected teacher at Apple Creek, retired 8/1/95.

9. Alice Stover, an affected teacher at Gallipolis Dev Center, disability retired effective 9/30/95.

EXHIBITS

Joint Exhibits

1. 1994-1997 Collective Bargaining Agreement

2. Grievance Trail

   a) Letter from Ellen Smith to Steve Gulyassy dated 6/30/95
   b) Grievance Form
   c) Association's Challenge to the Reduction in Force from Ellen Smith (5 pages)
   d) Agency Step 3 Response from Ed Ostrowski to Ellen Smith dated August 23, 199

3. June 1, 1995 letter from Ed Ostrowski, MRDD to Henry Stevens, SCOPE/OEA giving 45 day notice of potential RIF with attachments, seniority list of potentially affected employees and rationale

4. June 9, 1995 letter from Susan May to MRDD giving Association input prior to final decision

5. Letter dated June 14, 1995 from Ed Ostrowski MRDD to Henry Stevens, SCOPE/OA with attachments: RIF Final Listing of Employees with Seniority Dates, Revised Statewide Rationale
   a) Apple Creek De Center Rationale, Table of Organization, Position Descriptions of Affected Employees, Proposed Position Descriptions, and Proposed Table of Organization Organization, Position Descriptions of Affected Employees, Proposed Table of Organization, and Position Descriptions of Proposed Classifications.
   c) Montgomery Developmental Center Rationale, Table of Organization, Position Descriptions of Affected Employees, Proposed Table of Organization, and Position Descriptions of Proposed Classifications.
   d) Mt. Vernon Developmental Center Rationale, Table of Organization, Position Descriptions of Affected Employees, Proposed Table of Organization, and Position Descriptions of Proposed Classifications.
   e) Northwest Ohio Developmental Center Rationale, Table of Organization, Position Descriptions of Affected Employees, Proposed Table of Organization, and Position Descriptions of Proposed Classifications.
   f) Tiffin Developmental Center Rationale, Table of Organization, Position Descriptions of Affected Employees, Proposed Table of Organization, and Position Descriptions of Proposed Classifications.

6. List of affected SCOPE members current employment status

7. 1991 Medicaid Guidelines of ICF/MR Certified Facilities

8. DAS Class Specifications of Teachers Affected by RIF
   a) Teacher 2: 71112
   b) Teacher Art 1: 71121
   c) Teacher Elementary Ed 1, 2, 3, and 4: 71161, 71162, 71163, and 71164
   d) Teacher 2 English: 71172 and Teacher 4 English: 71174
   e) Teacher 2 LD/BD: 71212
   f) Teacher 1 to 4 MSPR: 71241, 71242, 71243 and 71244
   g) Teacher PE/H 1 and 2: 71261 and 71262
   h) Teacher 2 Science: 71282
   i) Teacher ABE: 71711

Employer Exhibits

The Employer submitted the following documents to the Arbitrator pursuant to this case:

M-1. Table: Number of Individuals Receiving Service, 1967, 1971, 1979, 1986. 1995. Level of Mental Retardation and Living Arrangements, February 1995.

M-2. State of Ohio Classification Specification: Teacher 1-4, Series No. 7172.

M-3. Position Description: Adult Basic Ed/GED Teacher.

M-4. State of Ohio Classification Specification: Vocation Habilitation Specialist, Series No. 6961.

M-5. State of Ohio Classification Specification: Human Services Program, Series No. 6941.

M-6. State of Ohio Classification Specification: Hospital Aide, Series No. 4411.

M-7. State of Ohio Classification Specification: Activity Therapy, Series No. 4421.

M-8. State of Ohio Classification Specification: Vocational Instructor, Series No. 1813.

M-9. Mt. Vernon Developmental Center, Response to SCOPE/OEA Challenge to ODMR/DD Rationale for Abolishing Teaching Positions.

M-10. Memorandum, dated March 23, 1995, from Barbara Ritter, Director, Program Services, Mt. Vernon Developmental Center, to Ed Ostrowski, Labor Relations, regarding MVDC Rationale Re: Teachers.

M-11. Day-to-Day Schedule of Teacher: MSPR, Diane Moore, Teacher Art 1 (50526.0)

M-12. Day-to-Day Schedule of Teacher: Kimberly Hensley, Teacher 1(50525.0)

M-13. Day-to-Day Schedule of Teacher: Frank Croskey, Teacher, MSPR 2 (50505.0)

M-14. Interoffice Memorandum, dated February 1, 1995, from Ed Ostrowski, MR_ELO, to Distribution List, regarding February 7th meeting

M-15. Interoffice Memorandum, dated February 15, 1995, from Elizabeth J. Dible, MR_LJD, to Distribution List, regarding OEA survey

M-16. Interoffice Memorandum, dated March 20, 1995, from Ed Ostrowski, MR_ELO, to Distribution List, regarding OEA abolishment planning

M-17. Interoffice Memorandum, dated March 28, 1995, from Ed Ostrowski, MR_ELO, to Developmental Center Superintendents, regarding ABLE grant delivery

M-18. Interoffice Memorandum, dated April 10, 1995, from Ed Ostrowski, MR_ELO, to Distribution List, regarding Teacher Information Needs

M-19. Interoffice Memorandum, dated June 9, 1995, from Ed Ostrowski, MR_ELO, to OEA Planning Committee Members, regarding OEA/SCOPE Response to Reduction in Force

M-20. Interoffice Memorandum, dated June 13, 1995, Fred L. Williams, Superintendent, to mr_tbr@mrvax, regarding OEA Reduction in Force

M-21. Interoffice Memorandum, dated June 13, 1995, from Patrick M. Herron, MR_TF_PMH, to Ed Ostrowski, regarding OEA Response to Rationale

M-22. Interoffice Memorandum, dated June 13, 1995, from Phyllis J. Shira, SHIPJ@A1@VERNON, to MR_ELO@A1@MRVAX, regarding Response to SCOPE position

M-23. TDC-237-C, Annual Individual Habilitation Plan Review, June 27, 1995

M-24. Daily Living Skills Assessment, Caryl _____

M-25. Apple Creek Developmental Center Communication Assessment, March 17, 1995

M-26. Apple Creek Developmental Center Annual Individual Program Plan Review, March 21, 1995

Union Exhibits

SC-1. Interpretive Guidelines - Intermediate Care Facilities for the Mentally Retarded, Rev. 212, J-49-J5

SC-2. Brief: United States District Court for the Northern District of Ohio, Eastern Division, James Sidels, et al., Plaintiff, v. Kenneth D. Gossett, et al., Defendants.

APPLICABLE CONTRACT PROVISIONS

ARTICLE 18 - REDUCTION IN THE WORK FORCE

18.01 - Pre-Reduction in Force Action

A. A reduction in force of employees may only be effected by the employing agency when such action is based upon any of the following reasons: (1) a reorganization for the efficient operation of the employing agency; (2) for lack of funds or lack of work to sustain current staffing; (3) for reasons of economy; a reduction in force may be either of temporary (less than one year) or permanent (more than one year) duration.

At least forty-five (45) days prior to the anticipated effective date of a reduction in force, the Association must be afforded an opportunity to meet with the Employer. At this meeting, the Association must be provided a written rationale, with supporting documentation if any has been prepared, setting forth the basis for the reduction in force.

* * * * *

When the Employer makes its final decision to effect a reduction in force, it may not move employees into or out of affected classifications within the affected facility and facilities in the county of or counties contiguous to the affected facility by means of promotions, transfers, voluntary reductions (as per Article 17), classification changes, or reassignments, except that transfers out of a

classification or implementation of the findings of a position audit commenced prior to the employing agency's final decision may be implemented.

* * * * *

C. Should the Association disagree with the Employer's rationale to effect a reduction in force, it may grieve the final decision for a determination of its substantive validity or any procedural errors regarding this Article . . . In expedited arbitration, the Employer bears the burden of proving by a preponderance of the evidence the substantive reason for the proposed reduction in force.

ARTICLE 15 - CLASSIFICATION

The Association shall have the opportunity to provide input before any changes are made in classifications or compensation levels assigned to classifications in the bargaining unit.

If the Association disputes the proposed compensation levels of a classification, then the Association and the Employer shall meet for an evaluation conference to discuss the compensation levels which have been assigned to the classification. Should the parties not be able to agree on the compensation levels, the Association may submit the issue to arbitration under Section 5.05(D) and Article 6 of this Agreement. The arbitrator selected shall be knowledgeable in occupations and compensation.

If a new classification is a successor title to a classification covered by the Agreement with no substantial change in duties, the new classification shall automatically become a part of this Agreement.

ARTICLE 3 - MANAGEMENT RIGHTS

3.01 Management Rights

Except to the extent expressly abridged only by

specific articles and sections of this Agreement, the Employer reserves, retains, and possesses, solely and exclusively, all of the inherent rights and authority to manage and operate its facilities and programs. The sole and exclusive rights and authority of management include specifically, but are not limited to the following:

1. determine matters of inherent managerial policy which include, but are not limited to areas of discretion or policy such as the functions and programs of the public Employer, standards of services, its overall budget, utilization of technology, and organizational structure;
2. direct, supervise, evaluate, or hire employees;
3. maintain and improve the efficiency and effectiveness of governmental operations;
4. determine the overall methods, process, means, or personnel by which governmental operations are to be conducted;
5. suspend, discipline, demote, or discharge for just cause, reduce in force, transfer, assign, schedule, promote, or retain employees;
6. determine the adequacy of the work force;
7. determine the overall mission of the Employer as a unit of the government;
8. effectively manage the work force;
9. take actions to carry out the mission of the public Employer as a governmental unit;
10. determine the location and number of facilities;
11. determine and manage its facilities, equipment, operations, programs and services;
12. determine and promulgate the standards of quality and quantity and work performance to be maintained; and
13. determine the management organization, including selection, retention, and promotion to positions not

within the scope of this Agreement.

ARTICLE 9 - CLASSROOM CLIMATE

9.04 - Development of Student Plans

In those facilities where an interdisciplinary team is utilized and the Employer requires an Individual Education Plan, then teacher or an educational alternate shall write the Individual Education Plan for input into the treatment goals and objectives.

The Employer recognizes the teacher who has primary responsibility for the students, or educational alternate,, as a core team member. In these instances, attendance at these meetings is encouraged and shall not be unreasonably denied. If a teacher is not in attendance at the meeting to develop the student plan, the goals and objectives the teacher developed shall be presented at the meeting.

In those facilities where an interdisciplinary team is utilized and where federal and/or state regulations require an Individual Habilitation Plan, the teacher or an educational alternate shall write recommendations for the educational component of the Individual Habilitation Plan.

When the Individual Habilitation Plan has an educational component the teacher or educational alternate shall be considered a part of the treatment team. In those instances a teacher or educational alternate shall be in attendance at the meeting.

BACKGROUND

The case before the Arbitrator concerns the merits of a reduction in force grievance filed against the Ohio Department of Mental Retardation and Developmental Disabilities (MRDD) by Susan May, et al., grievance number 24-01-950651-0134-10. This

arbitration developed as a result of a reduction in force (RIF) of thirty-two of the thirty-three remaining teaching positions at the six Developmental Centers identified in this case. The abolishment of these positions was effective July 16, 1995. More than half of the teachers filling these positions were rehired after the RIF into differently classified positions. The parties stipulate that those individuals are performing the same tasks as they were before the RIF. (Association's Brief at 2; Employer's Brief at 29.) Ten of the thirteen individuals affected were rehired at Apple Creek, and five of the six at Gallipolis.

ARGUMENTS OF THE PARTIES

The Employer's Position

In its opening statement, through testimony and argument, exhibits, written documentation, and in its post-hearing brief, the Employer focused on providing a justification for the reduction in force (RIF) as required under the collective bargaining agreement. The Employer argues that the RIF was justified based on the following reasons as set out in Article 18.01(A): "a reorganization for the efficient operation of the employing agency," and "for reasons of economy." The Agreement clearly states that a justification need be premised on only one of the three reasons listed in Article 18.01(A). The Employer did not provide a justification based on a lack of funds, even though over fifty-five percent (55%) of its funding is derived from Medicaid through Title XIX, Intermediate Care Facilities for

the Mentally Retarded (ICF/MR).

The Employer argues that the RIF was effected as a reorganization for efficiency and is based on the requirements established under ICF/MR. These requirements reflect a change in philosophy in the teaching and care of the mentally retarded, changes that had evolved since the 1980s and particularized in specific regulatory changes in 1988 and 1991. The rules and guidelines under the ICF/MR focus on training that is "functional" and "normalized," and mandate that clients interact with a variety of people daily.

Based on these regulations and the demographic changes in the population served by the MRDD, the Employer through written documentation, testimony, and argument described a gradual change in the teachers' duties from those of teachers to duties typically associated with Therapeutic Program Workers (TPW) or Vocational Habilitation Specialists (VHS). Thus, according to the Employer, the subsequent rehiring of eighteen of the thirty-three teachers affected did not result in the teachers being laid off and then rehired into lower paid positions where they were doing the same thing, but they were rehired in positions more compatible with the duties they were performing previously as teachers.

The Association's Position

The Association, through its written evidence and documentation, witnesses, cross-examination of Employer witnesses, arguments during the arbitration hearing, and throughout its post-hearing brief, asserts that the facts of the case resemble more closely a reclassification of these positions rather than a RIF. The Association's position is that the Employer, under the auspices of a proper RIF, has been able to retain a large portion of its teaching staff for a reduced rate of pay. Essentially, the Association relies on the undisputed fact that more than fifty percent of the individuals in the positions that were abolished have been rehired and are performing the same duties as they were prior to the RIF. The Association argues that this undermines any argument by the Employer to justify the RIF; the fact that the individuals were rehired and are performing the same tasks demonstrates that their function is needed by the organization.

DISCUSSION AND FINDINGS

As jointly stipulated by the parties, the issue the Arbitrator is charged with deciding is whether the Employer violated Article 18 of the SCOPE/OEA collective bargaining agreement. The central question before the Arbitrator is whether the Employer followed the terms and conditions of the collective bargaining agreement relative to the reduction-in-force of

bargaining unit members.

While the parties agree about the basic facts of the dispute; namely, that the Employer had abolished thirty-two of the thirty-three remaining teaching positions in the Ohio Department of Mental Retardation and Developmental Disabilities (MRDD) affecting teachers working in six of MRDD's twelve developmental centers, contention arises concerning whether the Employer's breached the contract in carrying out its actions.

Many of the questions raised by this arbitration concern the term used to describe an act by the Employer or the duties performed by a Teacher. These questions must be answered not by a battle of labels and names, but by an in-depth analysis of the substance and meaning of the thing labelled. Specific terms in dispute are whether the reduction in force was actually a reduction in force, and whether the duties performed by teachers meet the definition of "teaching." The Arbitrator must be guided by the language of the collective bargaining agreement.

First, regarding the RIF, the parties do not dispute the fact that eighteen of the thirty-three individuals whose positions were abolished were rehired into lower paid positions and are performing the same tasks (Association's Brief at 2; Employer's Brief at 29). The Employer does argue that because the school-age population at the affected Developmental Centers

had dramatically declined at the same time mentally retarded children were being "mainstreamed" into the adjacent public school systems, the teacher function had devolved from a primary, classroom-based, instructional activity to provider of daily, fundamental living skills through "continuous, active treatment".

Through written documentation and the testimony of Fred Williams, Assistant Deputy Director of MRDD's Division of Developmental Centers and Montgomery Development Center superintendent, as well as others, the Employer chronicled changes in treatment modalities for the severely mentally and developmentally disabled that have reshaped the scope and nature of programs and services. Among other things, Mr. Williams testified that the passage of Public Law 94-142, declaring that mentally retarded children were entitled to free education in the mainstream public schools, and its Ohio counterpart, Ohio House Bill 455, shifted the locus of responsibility for teaching school-age Developmental Center residences from the Centers to the relevant County schools. Moreover, according to Williams' testimony, the promulgation of federal guidelines under Title XIX, Intermediate Care Facilities for the Mentally Retarded (ICF/MR) detailing how services were to be provided to clients as a condition of certification further moved Centers away from their customary procedures. The Federal Medicaid regulations (ICF/MR) governing MRDD Centers were revised in 1988 and again in 1991. It was the testimony of Williams and Employer witnesses

from the other five Developmental Centers that the revised guidelines required that clients receive a continuous, active treatment program involving daily interaction with a variety of staff.

ICF/MR Regulations Numbers W195 and W196 (Joint 7 at 2) state:

> "(a) Standard: Active Treatment. (1) Each client must receive a continuous active treatment program, which includes aggressive, consistent implementation of a program of specialized and generic training, treatment, health services and related services described in this subpart, that is directed toward (i) the acquisition of the behaviors necessary for the client to function with as much self determination and independence as possible,..."

Section 483.440(a)(1) Guidelines delineate what continuous active treatment means:

> "Continuous is defined to mean the competent interaction of staff with individuals served at all times, in formal and informal settings, in the service of effective relationships in general between staff and individuals served, and the implementation of specific IPP objectives, in particular....Although the active treatment process must be identifiable in documentation, it must be observable in daily practice... The ICF/MR ensures that each individual receives active treatment daily regardless of whether or not an outside resource(s) is used for programming (e.g. public school, day habilitation center, senior day services program, sheltered workshop, supported employment)."

According to the testimony of Mr. Williams and management witnesses from other Centers, the Employer changed the operating structure of its Centers in response to the above guidelines from departmentalized service delivery to a continuous integrated style of service providing characterized by bringing services to

clients rather than moving the client to a discrete areas where services were to be provided. The Employer contends that the change in operational structure also was prompted by a precipitous drop in the resident population at the respective Centers, a drop of some 75 percent from 1974 (8300 residents) to 1994 (2100 residents) as well as a population age shift. Mr. Williams testified that only 2 percent of residents are under 22 years of age, the legally defined school age. The majority of residents (80 percent) are in the 23-55 age category. Through its witnesses and written documentation, the Employer sought to show that the duties of teachers came to resemble those of other service deliverers; namely, Therapeutic Program Workers (TPW) and Vocational Habilitation Specialist (VHS), as resident focus shifted from Individual Education Plan (IEP) for school-age clients to Individual Habilitation Plans (IHP) or Individual Program Plan (IPP) for adult clients.

The Employer maintains the mainstreaming of school-age into County-run school programs and efforts to integrate adult residents into community settings also have affected teachers. According to testimony by Kim Linkinhoker, Chief, MRDD Office of Adult Services, the conscious shift from institutionalization of adult and children to placing them into normal, community settings has not only meant that the 88 County Boards of MRDD have a greater degree of involvement in providing client services, but that the shift has obviated the need for teachers

fulfilling traditional Center-based, classroom instruction. Mr. Linkinhoker noted in his testimony that none of the County MRDD Board's Adult Service Staff are required to be certified by the Ohio Department of Education. Gail Lively, Classification and Compensation Administrator for the Ohio Department of Administrative Services offered testimony consistent with the testimony of Mr. Williams concerning certification requirements. Indeed, the Employers main argument here is that the reduction in force was an outgrowth of a reorganization for efficiency occasioned by philosophical, regulatory, and demographic changes impacting on the Centers and the overall DMRDD mission and delivery system.

The Employer also endeavored to show that the aforementioned changes in Center operations were accompanied by the introduction of interdisciplinary teams. According to witnesses for the Employer, including Apple Creek's Program Director Cheryl Webster, and Tiffin Developmental Center Program Director Corey Schultz, the interdisciplinary team bears the locus of responsibility for client assessment and providing continuous client training in daily living skills and other functional skills. Witnesses for the Employer testified that an interdisciplinary team exists for each mentally retarded client. As noted by the Employer in testimony and brief (Employer's Brief at 11), teams are required by ICF/MR to include the client, the client's legal guardian, and a Qualified Mental Retardation

Professional (QMRP). The QMRP is the only professional statutorily required on the interdisciplinary team. Depending on the specific needs of the client, the QMRP may assign an occupational therapist, physical therapist, nurse, or speech therapist to the client's team. In every case, a therapeutic program worker (TPW) is assigned to every team and that TPW has primary caregiving responsibility in terms of daily life skills assessment. According to Ms. Webster and Mr. Schultz, while a teacher might be deployed by the QMRP to address a client's needs, there is no ICF/MR requirement that a teacher be used.

Finally, the Employer claims that economic considerations, while not the primary moving force in the reduction in force, did factor into the ultimate decision to abolish the teacher classification. In its rationale for abolishing the teacher positions (Joint 5 A, B, C, D, E, and F; Employer's Brief at 12-13), the Employer asserts two reasons why it cannot continue to pay salary and benefits for teachers:

> "(1) the duties they are performing are actually those properly belonging to other classifications represented by 1199 and OCSEA; and (2) the funds can be utilized to create and fill vacancies in those appropriate classifications at lower pay ranges." (Employer's Brief at 12-13)

The Employer's further stated that "it is not fiscally prudent to pay for a level of expertise that is not needed." In supporting its position, the Employer presented testimony from officials from each of the six Developmental Center indicating that: (a) each of the Centers had created classifications adjudged to

better meet the needs of the clients; (b) each of the Center had crafted, oftentimes with support from central administration, statements justifying their reduction initiatives; (c) none of the Centers updated the Position Description of teacher. On this latter point, Compensation Administrator Gail Lively testified that she would have disapproved an updated teacher position description based on the duties the teachers were performing under the revised ICF/MR specifications.

The Employer maintains through its opening statement, written documentation, witnesses, and post-hearing brief that it made a good faith effort to employ the individuals in the affected positions for as long as it could. As evidence of its good faith, the Employer contends that it took steps to find employment for the affected employees in other classifications within MRDD or with other state agencies; consequently, only thirteen employees were left without state employment.

Although the Association did not present an opening statement, its written documentation, witness examination and cross-examination, and post-hearing aim to counter the Employer's assertion that ICF/MR guideline changes or any other circumstances had resulted in fundamental operational changes at the various affected Centers relative to the day-to-day activities of teachers. The core of the Association's position, as expressed it its post-hearing brief, is that the Employer's

reduction in force was a pretext for changing the teacher classification without complying with Article 15 of the collective bargaining agreement.

Among other things, the Association argues that Article 15 of the union contract details the procedure the Employer is bound to follow in reclassifying bargaining unit members. By failing to follow such procedures, the Association asserts, the Employer breached the terms of the collective bargaining agreement. Indeed, the Association believes that the Employer's actions cannot be construed as a reduction in force "within the confines of any reasonable interpretation of that concept" (Association's Brief at 7). In the Association's view, the fact that the majority of the affected employees, were not released but retained as ODMRDD personnel to do what they had been doing previously, except in different job classifications and at a lower rate of pay demonstrates that the Employer did not intend to reduce its workforce. The Association's witnesses testified uniformly that little if any differences exist between what their job duties were just before and just after the reduction in force took place.

The Association introduced witnesses, written documentation, and brief attesting to its assertion that not only was the reduction in force a contractual breach, but that such action was taken without substantive validity. Association witnesses Vera

Wood, Diane Moore, Kathryn Meitzler, Frank Croskey, Dr. Marion Stroud, Alice Coffman, Donna Lynds, and Susan May each provided testimony buttressing the claim that "all of the individual adult residents of the institutions at issue in this matter who were receiving education services provided by a teacher had been individually evaluated and determined to be in need of such services" (Association's Brief at 8). Without re-evaluating each client, the Association argues, the Employer was without any substantive basis for determining that the educational services needs of clients had been satisfied, and, accordingly, without a valid rationale for eliminating the professional teacher positions. To wit, the Association argues that for the Employer to base its reduction in force decision not on client needs but rather the status of the teachers addressing such needs is "inexcusable" (Association's Brief at 9).

The Association further asserts that the Employer had developed the language and justification for the Rationale for the Reduction in Force for teachers at each of the affected Centers while simultaneously insisting that each Center was an autonomous operating unit. By playing so prominent a role in the development of the reduction in force rationale statement for each of the Centers, the Employer had consciously and deliberately coordinated the entire matter to achieve the singular objective of eliminating all teacher positions at the six Developmental Centers.

Finally, the Association submits that the Employer's own exhibits, introduced as Management Exhibits 23-26, offered on the final arbitration hearing day provided uncontested proof that the services of professional teachers still were needed. These exhibits make reference to "educational staff" carrying out service objectives, a client attending classes, and the placement of a client in "a classroom such as Language" (Association's Brief at 12). Such references, the Association concluded, establishes the continuing need for educational services to clients and for teachers to provide same.

The settlement of the case before the Arbitrator requires a determination of the salient, fundamental issue(s) that animate this dispute. As jointly stipulated by the parties, the issue the Arbitrator is charged with deciding is whether the reduction in force conducted by ODMRDD at the six affected Development Centers in accordance with Article 18 of the contract. While the parties are in agreement as regards the basic facts of the dispute, each side differs on interpretation of the contract provision - Article 18 - as it relates to the handling of the affect positions and their incumbents.

Clearly the burden of proof in this case rests with the Employer. The Employer must show by a preponderance of the evidence the substantive validity of its rationale and its

actions as required by the provisions of Article 18 of the collective bargaining agreement. Article 18.01 sets forth three conditions under which the Employer may effect a reduction in force: efficiency, lack of funds, and reasons of economy. The contract indicates that a reduction in force may be carried out if any of the aforementioned reasons can be substantively validated. For purposes of this case, the Arbitrator concurs with the reasoning of Arbitrator Jonathan Dworkin (see OCB Award #425 at 22-23, Employer's Brief attachment) that the term substantive validity is "not a model of clarity" and that the pivotal standard the Arbitrator must keep in mind is "what the Employer defines as its goals, not what ought to be its goals." Again, following the thinking of Arbitrator Dworkin, such goals, however, must not be "arbitrary, discriminatory, or instituted in order to undermine the Bargaining Unit and erode contractual commitments." Accordingly, the Association would be obliged to demonstrate to the Arbitrator that the Employer's rationale and actions in this case were arbitrary, discriminatory, capricious, or in bad faith.

Both the Employer and the Association mounted spirited, thoughtful, and detailed evidence, arguments, cross-examination, and post-hearing briefs in support of their respective positions. Notwithstanding the considerable body of written documentation and evidence submitted by both parities, the issue turns on a very narrow point; namely, whether any of the provisions of

Article 18 of the collective bargaining agreement were breached by the Employer in carrying out its reduction in force. Based on the full record of this case as presented by the parties, the Arbitrator finds that the Employer breached none of the provisions of Article 18. Moreover, once the reduction in force was completed the affected employees effectively were free to accept or decline subsequent offers of employment in other classifications. The reduction in force was one distinct action; the hiring of some of the same people affected by the reduction in force into other classifications at lower pay was another distinct and separate action entirely. If the Employer erred, it was with respect to attempting to place the affected employers in positions at their former place of employment rather than seek to fill needed positions through hiring others. While offering the affected teachers other classifications in the same facilities may have been done with an abundance of concern for the welfare of those losing their positions and in good faith, it created a grievable situation for the Association and the class of employees petitioning this Arbitrator for relief. While it might be tempting to speculate whether the six Centers could have remained in compliance with ICF/MR and Medicaid guidelines, court orders, or other legal requirements without the willingness of the affected employees to accept other classification positions is beyond the scope of this arbitration.

The Employer provided persuasive arguments based on documentary evidence and testimony to support the reduction in force based on efficiency and for reasons of economy as required by Article 18 of the collective bargaining agreement. Although the Association argued, for example, that the reduction in force was a subterfuge for reclassifying bargaining unit members, it did not provide evidence that any bargaining unit member had been coerced into accepting the lower paid positions and difference classifications. Moreover, the Association failed to show that the Employer was being arbitrary in shifting the focus of care for the mentally retarded from isolated, departmentalized care to continuous learning in all settings. The shift has its genesis in changing federal and state law and the Employer was obliged to respond to these changes accordingly. The Employer responded by reorganizing for the efficient operation of its Developmental Centers through interdisciplinary team-based case management with QMRPs rather than Nurses or others being the lead professional, changing the classification of Hospital Aide to Therapeutic Program Worker in the early 1990s, and abolishing the Teacher classification on July 16, 1995. Indeed, according to the testimony of Eric Young, Program Director of the Gallipolis Development Center (GDC), the GDC teaching position was replaced entirely with that of Social Program Specialist positions.

The Arbitrator finds from the testimony of Gail Lively, Classification and Compensation Administrator for the Ohio

Department of Administrative Services, testimony not impeached during cross-examination, that had a comprehensive reclassification audit of the teacher position been conducted, it is likely the teacher position would have been downgraded given that this position no longer calls for teaching clients under 22 years of age in classroom settings - a responsibility now handled by the respective County School Boards - and the dispersion of responsibility for addressing the IHP or IPP training needs of adult client to all team members. To be sure, the Employer was entitled under the Management Rights provisions of the contract to either seek to reclassify the teacher positions or decide that they were superfluous and abolish them. The Employer chose to abolish the teacher positions and provided the Association, as is evident from the train of documents jointly submitted by the parties, ample time and opportunity to respond to its decision in accordance with Article 18 of the collective bargaining agreement. To deny the Employer the right to efficiently reorganize its operations merely because such a reorganization might result in workforce reductions would be to unduly fetter Management in the exercise of its rights. If the Employer is able to provide a substantially valid reason for such actions, then the Arbitrator has no option but to uphold that right.

As regards the question of whether or not the Employer had economic justification for the reduction in force, the Arbitrator concurs with the Employer in its contention that it has a

fiduciary responsibility to administer budgets prudently and that to retain a class of positions after their utility has elapsed does not make economic sense. Granted the affected teachers were predominately persons with significant lengths of employment with the ODMRDD and had been valued employees, but philosophical, regulatory, budgetary, and demographic circumstances outside the control of the Association or the Employer changed the nature, scope, method, and venue for delivering educational services to the mentally retarded. The Employer was in its rights to attend to its costs by eliminating areas of redundancy in its classifications, even, regrettably, if teachers were adversely affected by the reduction in force.

The Association maintained through the course of this arbitration that the Employer's action was fictitious, since those who were rehired into lower paid positions and different job classifications were doing essentially the same thing the day after the reduction in force as was the case the day before. Association witnesses provided testimony showing that their responsibilities did not alter with the reduction in force. The Employer does not refute this assertion other than to point out that the teacher classification was a misnomer and did not reflect the duties actually performed by these bargaining unit members working under the teacher classification before the job abolishment. The Arbitrator finds that the similarities in duties for the affected employees before and after the reduction in

force does not invalidate the Employer's right to abolish a given classification if it no longer has meaning or relevance.

On the question of relevance, a key issue the Association raised is whether what the affected employees were doing after the reduction in force was teaching of the same sort they had always been doing. The Association argued that regardless of the venue, what the affected employees continued to do without interruption was teach and, accordingly, the Employer wrongly stripped them of their rightful classification and reduced their pay. Conversely, the Employer's argued that many of a teacher's duties were performed by those in other classifications. Indeed, under the interdisciplinary team approach to case management, it would be possible for incumbents in non-teacher classifications to be doing much of the same work as someone classified as a teacher because the teacher classification had lost its primacy in regard to providing educational services in a classroom setting. It is the Employer's position that the affected employees were doing the same tasks in as much as the task in question was no longer a strict teacher function.

There is no definition of teaching listed in the Agreement nor does either party argue an appropriate definition. *Webster's New World Dictionary* defines "to teach" as follows: "1. to show how to do something; give lessons to 2. to give lessons in (a subject) 3. to provide with knowledge, insight, etc. -- to be a

teacher." The Employer states that "teaching is a continuous, day-long program that transcends caregivers and locales." (Employer's Brief at 12). Similarly, the Employer's brief states, "Nothing in the IPP identified a service that only a teacher could provide." (Employer's Brief at 15). Elsewhere, the Employer's brief implicitly defines teaching by describing what it is not. For instance, "guiding and directing clients in various *activities* that encourage development of skills of daily living" is not regarded as teaching by the Employer. (Employer's Brief at 31, italics original).[1]

The Association, on the other hand, does not address the definition of teaching. Rather, it focuses on the fact that the individuals in the positions that were eliminated are now performing the same duties in different positions at lower pay. Quite simply, prior to the RIF, these individuals were classified as Teachers; after the RIF more than fifty percent of them were rehired into different classifications but performing the same duties.

At the same time that the Employer advocates a broadened definition of teaching, it attempts to limit the tasks and duties a teacher may perform. For example, the Employer makes a

[1]It is important to note that the Employer makes this statement in the context of arguing that the teachers were formerly eroding work that belonged to bargaining unit 1199 and OCSEA classifications.

distinction between vocational and educational. (This is a fairly well recognized distinction.) However, the brief states, "if an educational need is specifically identified by the Interdisciplinary Team for an adult, that need would be addressed by the Adult Basic Literacy Education (ABLE) Coordinator who is a Habilitation Specialist, not a teacher." (Employer's Brief at 15).

It seems to this Arbitrator that teaching in the context of the dispute has two separate meanings. There is the teaching of daily living skills which is accomplished by TPWs, VHSs, and others, including those classified as teachers. This type of teaching might be called socialization or self-help training. Virtually anyone trained in caring for the mentally retarded can provide training of this sort. Conversely, there is teaching in the everyday sense of the term involving matriculation through a State-mandated course of study resulting in the receipt of a pass to a higher grade and, ultimately, a certificate of completion or diploma.

To satisfy this second kind of teaching, the State requires specific training on the part of the teacher and provides appropriate certification of same. When the ICF/MR and other regulations required MRDD teachers to pass students through a State required course of study, these teachers were satisfying the everyday definition of teaching involving State-mandated

classroom instruction. When the State abolished the requirement to provide mentally retarded adults with a State required course of study, and when the various counties took over responsibility for educating the mentally retarded under 22 years of age, the function of teacher as an occupational classification tied to a State-regulated educational enterprise was vacated. Granted the affected employees may have continued to go about their tasks in classroom settings or under the banner of teaching, but their actual tasks could have been and, indeed, were done by others besides themselves. Thus, the Arbitrator finds that while both the Employer and the Association used training and teaching interchangeably, the activities being performed by the affected employees at the time of the reduction in force constitute daily living skills or self-help training. The category of teacher existed in name only. It is the Arbitrator's view, based on the evidence presented by the parties, that those formerly classified as teachers were doing the same things immediately after the reduction in force as immediately before. It was not teaching but training.

The Employer states that no federal or state law requires the education of adults. Were the Employer to provide education by teachers to adults, it would be in violation of no federal or state law. Similarly, meeting the minimum requirements of ICF/MR certification does not prohibit the Employer from exceeding those requirements. As long as the service in question is deemed

necessary by professional standards, the MRDD would not be in danger of losing its certification and consequent funding. (See Employer's Brief at 10-11, citing Section 483.440 (c)(3)(v) of the ICF/MR Guidelines.) The Employer chose not to pursue such a course of action.

During the course of the arbitration the Association indicated the Employer withheld important documents which would have shown the reduction in force was invalid or otherwise engaged in concerted action to abolish Bargaining Unit positions. On May 3, 1996, the Arbitrator had occasion to review electronic and other correspondence between the six Development Centers and Central Offices of the Chief of Labor Relations, Ed Ostrowski, to ascertain if the Employer had excluded from the Association's evaluation relevant documents concerning the reduction in force. The Arbitrator spent an hour carefully sifting through these Center surveys. They did not contain any information not substantially included in the respective Rationale for the Reduction in Force statement submitted by the six Centers. Indeed, upon review of the entire record of this case, the Arbitrator finds no evidence that the Employer colluded against the Association by omission or commission. The Employer's Office of Labor Relations was within its right to provide technical assistance to each Centers up to and including assistance in crafting its rationale for reduction in force.

The Employer included in its brief a number of prior arbitration decisions which bear passing mention. These were offered to buttress its position that its actions were valid contractually.

EXAMINATION AND DISCUSSION OF PRIOR ARBITRATOR'S DECISIONS

Each of the other arbitrations did not involve the argument raised by the Association in this case; *i.e.*, that the RIF was substantively a disguised reclassification. This is a crucial argument to the Association's case. For instance, the Pincus decision may be distinguished from this one on its facts. That arbitration involved the abolishment of a position without a subsequent rehiring. While the Employer offered similar arguments to justify the abolishment, the Association could not make the reclassification argument since the facts did not support it.

The Rivera decision is distinguishable in the same way. The grievant in that arbitration was not rehired into a lower paying position comprising the same tasks. The facts suggest a reorganization and permanent abolishment of the position. Thus, because of the different facts of these cases and the different arguments presented by the parties, those previous decisions are inapposite to the current arbitration.

Each of the related arbitrations is distinguishable from this one factually. First, the other arbitrations did not involve the rehiring of individuals whose positions had previously been abolished and whose new positions involved performance of the same tasks as their prior positions. Second, the Association did not raise the argument that the reductions in force were really disguised reclassifications. This set of facts and the Association's reclassification argument are substantive differences from the other arbitrations.

1. David M. Pincus, Award Number 1096.

This arbitration involved the abolishment of a position without a subsequent rehiring. While the Employer offered similar arguments to justify the RIF, the Association could not make the reclassification argument since the facts did not support it. The justifications offered by the Employer were: "(1) reorganization at the facility for efficiency; (2) lack of work to sustain staffing levels; and (3) for reasons of economy." (Award #1096, at 9). In ruling in favor of the Employer, Arbitrator Pincus focuses, as does the Arbitrator here, on the degree of merit contained in the Employer's rationale.

2. R. Rivera, Award Number 830.

This decision is distinguishable in the same way as the

aforementioned. The grievant in this arbitration was not rehired into a lower paying position comprising the same tasks. Rather, the facts suggest a permanent abolishment of the position. Furthermore, the issue in this arbitration was whether the work absorbed by the executive director was "inherently bargaining unit work." Thus, that arbitration focused on a different question from the current one. Also distinguishable is the fact that the Union bore the burden of proving its assertion that the work in question was bargaining unit work.

3. Andrew J. Love, Award Number 535.

The issue in this arbitration was whether a new position created, Vocational Habilitation Specialist 2, was eroding the work of her bargaining unit. The Arbitrator in this case made his decision based on procedural requirements of the Agreement. Since the job description for the VHS 2 position was in existence in 1987, a challenge by the Union should have been made at that time; the grievance in 1990 was untimely. Thus, this decision did not deal with the substantive issues of either a reduction in force or a reclassification. This case does provide however an interesting factual history to the current arbitration.

4. R. Rivera, Award Number 928.

This arbitration concerns the proper procedures for recall in the event of a RIF. The grievant claimed that he was not recalled for relevant positions even though he was qualified for

them based on the types of tasks he performed in his original position before the RIF. Interestingly, the question in this arbitration turned on job classifications as set forth in Article 18.12(A)(2). The language in that section is clear and unambiguous, whereas the question in the current case requires an analysis of not only the language in the contract but also the resulting situation based on the "RIF." The Arbitrator was not persuaded by an argument in equity since the grievant took advantage and prospered by the position he was now challenging.

5. Mollie H. Bowers, Award Number 1029.

This arbitration involved the precise challenge of the justifications of a RIF by the Employer. The Union questioned the basis of the Employer's decision and attempted to show that the Employer's justifications did not meet the level of "substantive validity." Again, the issue of a disguised reclassification was not relevant here. It is interesting to note that a strict view of the job descriptions was favored by the Arbitrator rather than an in-depth analysis into the duties actually performed by the grievant.

6. Jonathan Dworkin, Award Number 425.

This decision, referenced earlier, is distinguishable based on the fact that it is limited to the question of the validity of the Employer's reasons for effecting a RIF. This Arbitrator did, based on the different set of facts, favor a decision on the

merits rather than procedural issues. Notably, the Association argued that a decision involving a RIF has to be made by considering job functions as well as job classification. This decision clearly points out the different philosophical approach of all the awards: whether to make a determination based on the job descriptions and job classifications or to look beyond those records to the actually tasks performed in day-to-day setting.

What the Arbitrator sought to do in this case is to rely heavily on a determination as to whether the Employer violated the procedural requirements of the contract. Procedurally, the Employer did not breach the collective bargaining agreement and in particular Article 18. While the Arbitrator appreciates that there are different administrative and operational circumstances at each of the six Developmental Center, none of the specific facts situations at any of the Centers would alter in any significant fashion the findings in this case.

AWARD

The grievance is denied in its entirety.

Everette J. Freeman, Ed.D.
Arbitrator

September 23, 1996
University Heights, Ohio