#1181

IN THE MATTER OF THE ARBITRATION BETWEEN:	* **Grievance No. 23-18-951004-0172-01-11**
The Health Care and Social Services Union, Service Employees International Union, AFL-CIO	* **Grievant: Hilary Battle**
-and-	*
Northcoast Behavioral Healthcare Systems	*

ARBITRATOR: Mollie H. Bowers

APPEARANCES:

For the Union: Maria Margevicius, Advocate

For the Employer: Linda Thernes, Advocate

The Health Care and Social Services Union, Service Employees International Union, AFL-CIO (hereinafter, "the Union") brought this case to arbitration to seek reversal of the layoff of Chaplain Hilary Battle (hereinafter, "the Grievant") by the Northcoast Behavioral Healthcare Systems (hereinafter, "the Employer"). The Hearing was held on December 10, 1996, at 9:30 a.m. in the Conference Room of the Western Reserve Campus. Both parties were represented. They had a full and fair opportunity to present testimony and evidence in support of their position and to cross-examine that of the opposing party. At the conclusion of the Hearing, the parties presented oral closing arguments.

ISSUES

At the outset of the Hearing, the Employer challenged the grievability and arbitrability of the issue on the merits.

With respect to the substantive issue, the Employer claims it is:

Whether the Grievant was laid off in accordance with the collective bargaining Agreement? If not, what shall the remedy be?

The Union contends that the issue is:

Whether the rationale for the Grievant's layoff was seriously flawed and/or discriminatory,

in contravention of the Agreement? If so, should be the remedy be to reinstate the Grievant and make him whole?

After thorough consideration of the record, the Arbitrator has determined that the Employer's statement of the issue shall be applied to the merits of the case. This determination was made because the Union's statement is subsumed within that set forth by the Employer.

PERTINENT CONTRACT CLAUSES AND LAW

ARTICLE 6 - NON-DISCRIMINATION

Neither the Employer nor the Union shall unlawfully discriminate against any employee of the bargaining units on the basis of race, sex, creed, color, religion, age, . . . or discriminate in the application or interpretation of the provisions of this Agreement, except those positions which are necessarily exempted by bona fide occupational qualifications due to the uniqueness of the job, and in compliance with the existing laws of the United States, the State of Ohio, or Executive Orders of the State of Ohio. . . .

ARTICLE 7 - GRIEVANCE PROCEDURE

7.06 Grievance Steps

The parties intend that every effort shall be made to share all relevant and pertinent records, papers, data and names of witnesses to facilitate the resolution of grievances at the lowest possible level. The following are the implementation steps and procedures for handling a member's grievance:

. . .

Step 2 - Next Level Supervisor or Agency Designee

. . . Written reprimands may be grieved directly to Step 2. The decision at Step 3 shall be final. Verbal reprimands shall not be grievable, nor shall they be placed in an employee's personnel file.

ARTICLE 29 - LAYOFF AND RECALL

29.01 Notice

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 work site(s) affected. When the layoff involves a work site with more than one (1) employee in a classification series, the layoff shall be within the entire classification series. . . .

The agency will schedule a meeting with the Union to explain their reasons for such action. The Union's comments and ideas give to avoid the layoff will be seriously considered before making a final decision.

. . .

Every effort will be made to place employees in comparable employment in the public or private sector. The agency shall notify all affected employees of the impending layoff at least forty-five (45) days prior to the effective date of any layoff, if the reason is for lack of funds, and ninety (90) days prior to notice shall be given to affected employees for any other reason.

. . .

29.04 Appeals

Grievances resulting from Layoff and Recall procedures shall be grievable directly to Step 3 of the Grievance Procedure.

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ARTICLE 33 - SERVICE DELIVERY

The Employer and the Union recognize the continuing joint responsibility of the parties to ensure that client, patient and inmate services are fully and effectively delivered, that clients', patients' and inmates' safety and health are protected, and the highest standards of professional care are maintained.

ARTICLE 38 - JOB AUDITS AND APPEAL

A. . . . When position descriptions are changed, employees shall be furnished a copy and shall be allowed to comment and propose changes.

. . .

ARTICLE 39 - CLASSIFICATION CHANGES

The Employer may create classifications, . . . if needed for recruitment problems or other legitimate reasons, and issue or change specifications for each classification as needed. . . .

. . .

ARTICLE 40 - QUALITY SERVICES THROUGH PARTNERSHIP

40.01 - Statement of Principle

The Employer and the Union are mutually committed to continual improvement of quality state provided services through a joint partnership involving union leaders and staff and the bargaining unit members they represent, agency directors and their agency management staff at all levels of their organizations. . . . It is recognized by the parties that QstP is a separate process from the normal collective bargaining and contract administration procedures. . . .

ARTICLE 41 - SUB-CONTRACTING

41.01 - Contracting Out

The Employer intends to utilize bargaining unit employees to perform work which they normally perform. However, the Employer reserves the right to contract out any work it deems necessary or desirable because of greater efficiency, economy, or programmatic benefits or other related factors.

Changes in State policy or methodology for delivering services may result in the discontinuation of services or programs directly operated by the State.

Every reasonable effort will be made to avoid the layoff of an employee as a consequence of the exercise by the State of its right to contract out.

41.02 - Facility Closings/Service Elimination

Should it become necessary to close a facility or eliminate a service, the following guidelines will be utilized:

A. Where individual facilities are closed or services eliminated, the provisions of Article 29 Layoff and Recall would apply;
B. Departments will seek to absorb all affected employees or held laid off workers obtain employment in other areas of the public sector;
C. A concerted effort will be made to relocate laid off employees within the framework of any new delivery system. . . .

. . .

Ohio Revised Code, Section 4117.08

(A) All matters pertaining to wages, hours, or terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement are subject to collective bargaining between the public employer and the exclusive representative, except as otherwise specified in this section.

. . .

(C)(6) Determine the adequacy of the work force;

. . .

(C)(9) Take actions to carry out the mission of the public employer as a governmental unit.

. . .

ARBITRABILITY

There is a threshold question regarding the grievability and arbitrability of the issue on the merits which must be addressed first.

Employer Position:

According to the Employer, the Union has no standing to grieve or to arbitrate management's decision to layoff the Grievant based upon a claim that the rationale for such decision was severely flawed. The Employer points out, first, that the Ohio Revised Code (ORC), Section 4117.08 (C)(6) and (9) reserves to management, regardless of the collective bargaining Agreement, certain rights which were exercised appropriately in the instant case. It argues that economic realities associated with increasing private sector competition necessitated the Employer's decision to merge into one, the three existing units comprised of the Cleveland Psychiatric Institute (CPI), the Western Reserve Psychiatric Hospital (WRPH), and associated State Operated Services (SOS) (e.g., half way houses, staffed by state employees in 23 scattered locations). These same economic realities were also the basis, the Employer claims, upon which management made decisions about the "adequacy of the work force" and about the "mission" of the reconstituted unit " as a governmental" entity. In using the ORC as part of its affirmative defense, the Employer notes that the law is incorporated, by reference, into the parties' Agreement in Article 5 - Management Rights.

Second, the Employer asserts that nothing contained in Article 5 of the Agreement, limits management rights to layoff the Grievant under the circumstances of this case. The Employer stresses that it met its contractual obligation to meet with the Union and to "seriously" consider it's input "before making a final decision". Demonstration of such consideration, the Employer maintains, is evidenced by the fact that the Union indicated the Grievant was not the least senior Chaplain targeted initially for layoff and, as a result, management adjusted staffing which resulted in the layoff of one full-time and one half-time Chaplain, instead of one full-time Chaplain.

The third position taken by the Employer is that "the contract is an objective manifestation of the parties' intent" at the bargaining table. It claims that nothing in the ORC or in the Agreement specifically limits managements' wide discretion to determine "the adequacy of the work force". According to the Employer, once it complied with the 'met and confer' obligation set forth in Article 29.01 of the Agreement, management has the unfettered freedom to act; which it did.

The Employer responded to the Union's contention that no claim had been made, prior to the outset of these proceedings, that this grievance was not grievable and/or arbitrable. The Employer made a vague reference to Elkouri and Elkouri, and asserts this substantiates it's position that arbitrability can be "raised at any time" without jeopardizing the standing of such a claim.[1] In conclusion, the Employer asserted that it's challenge to grievability and arbitrability is based upon basic contract construction and that, unless a specific limitation circumscribing management rights is contained in the Agreement, the Employer must prevail in this threshold challenge. It also emphasized that Article 29, Section 29.01, paragraph three specifically states specifically that notice of layoff "for any other reason" be provided "ninety (90) days prior" and that such notice was

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[1] Neither an edition nor any page(s) reference was supplied by the Employer .

provided in the instant case.

Union Position:

The Union strenuously objects to the Employer's belated raising of a challenge to the grievability and arbitrability of the merits of this case in violation of Article 7, Section 7.06 of the Agreement. According to the Union, the fact that the Employer also addressed this grievance in the negotiated procedure and accepted it's submission to arbitration belies the claim that this case on the merits is neither grievable nor arbitrable.

It is also the Union's position that there is no provision in Article 29 of the Agreement which bars the Union from filing a grievance to protest the rationale for a layoff. According to the Union, it would be "absurd" to believe that it agreed to Article 29, Section 29.01, paragraph two without intending that the rationale for a layoff was both grievable and arbitrable.

As further support for this assertion, the Union points to Article 7, Section 7.06, Step 2 of the Agreement, wherein the only explicit restrictions on grievability pertain to written and verbal reprimands. The Union argues that if other restrictions had been intended by the parties when they negotiated the Agreement, then these, too, would have been set forth in this provision.

According to the Union, when Elkouri and Elkouri addressed challenges to grievability and arbitrability, they also spoke to the "logic and to the logical outcomes" of such decisions.[2] The Union reiterates that it would not have negotiated a provision for a meeting on layoffs if there could be "no substantial outcome" other than the parties blowing "smoke at each other" As indication that it's interpretation is correct, the Union posed the question what would happen if, at such meeting, the Employer indicated that an employee was being "laid off for the clothes she/he wears"? If the

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[2] Neither an edition nor any page(s) numbers were provided by the Union.

Employer's theory is correct, the Union maintains that the ridiculous result would be that it could not grieve unless the affected employee was not the least senior person. This surely was not the intent, the Union claims, when the parties negotiated Article 29.01 of the Agreement.

For all the aforesaid reasons, the Union argues that the instant case is both grievable and arbitrable.

ANALYSIS

It is understandable, for reasons stated by the Union on the merits, that it sought to protest the Grievant's layoff. However, careful consideration of the arguments on arbitrability, the ORC, and the Agreement support the Employer's assertion that this matter is neither grievable nor arbitrable. Note was taken of the provisions set forth in Article 7, Section 7.06 of the Agreement. Even if it is true that the Employer failed to raise the threshold challenge until the arbitration stage, Elkouri and Elkouri state that, "The right to contest arbitrability before the arbitrator is not waived merely by failing to raise the issue of arbitrability until the arbitration hearing".[3] Additionally, a negative inference cannot be drawn from the fact that the Employer participated in the steps of the negotiated grievance procedure, since the parties have given the arbitrator the right to decide challenges to grievability and arbitrability.

There is also no evidence in the Agreement which expressly permits the Union to grieve/arbitrate a layoff decision because a claim is made that the rationale is seriously flawed. Article 7, Section 7.06, Step 2, paragraph two addresses, in pertinent part, how verbal and written reprimands shall be handled. The absence of a bar there to grieving the rationale for layoff decisions

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[3] Elkouri and Elkouri, How Arbitration Work, fourth edition (The Bureau of National Affairs, Inc., Washington, D.C., 1985), p. 220.

is not tantamount to an express statement of intent to legitimize such grievances as claimed by the Union in the instant case. There is nothing in the Agreement, or in any practice, which proves persuasively that the parties intended that the rationale for a layoff decision shall be grievable and arbitrable.

Reinforcement for this conclusion is provided by the plain language of Article 29, Section 29.01, paragraph two which, in essence, obligates the Employer to 'meet and confer' with the Union and to seriously consider it's input when making a layoff decision. This is a subject which the parties negotiated over and on which they reduced their intent, at the bargaining table, to the express language contained in Article 29. The evidence of record is uncontroverted that the Employer met this obligation. The Arbitrator must therefore conclude that the Union is now attempting to obtain through arbitration that which it did not at the bargaining table.

Additionally, the ORC excludes specifically from the realm of collective bargaining, the Employer's right to "Determine the adequacy of the work force". This exclusion is reiterated in Article 5 of the parties' Agreement. The Union's claim on the merits does not concern the adequacy of the Grievant's layoff notice, the denial of appropriate bumping rights (Article 41.02 (B)), and/or that such decision was made for the purposes of discriminating against the Grievant as an African American. It does assert that such layoff was discriminatory to the substantial African American clientele and resulted in an unmanageable workload for the remaining Chaplain. This may or may not be true, but the facts remain, and are insurmountable, that the ORC and the Agreement reserve to management the right to "Determine the adequacy of the work force", and, in the instant case, no grievable or arbitrable circumstance was protested by the Union which would give it standing in this proceeding on the merits of this case.

This conclusion holds, despite the provisions of Article 33 and Article 40, Section 40.01, of the Agreement. With respect to Article 33, the language states essentially that a commitment is made by both the Employer and the Union to "fully and effectively" deliver services to clients. This Article in no way restricts management rights to "Determine the adequacy of the work force" required for such purpose. Article 40, Section 40.01 is, essentially, a "Statement of Principle" by both parties that they are committed to a "partnership" dedicated, among other things, to continually improving the quality of "state" services provided. Neither of these Articles diminishes expressly management rights to "Determine the adequacy of the work force" for such purposes.[4]

While the Union's concern is understandable and is not frivolous, neither the ORC nor the Agreement permit a decision that the merits of this case as grievable and/or arbitrable.

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[4] These issues were addressed because these articles of the Agreement were set forth in the grievance.

AWARD

The Arbitrator has determined that this case is neither grievable nor arbitrable.

DATE: December 23, 1996 Mollie H. Bowers

Mollie H. Bowers, Arbitrator