

VOLUNTARY RIGHTS ARBITRATION

IN THE MATTER OF ARBITRATION BETWEEN:**THE STATE OF OHIO, OHIO DEPARTMENT OF MENTAL RETARDATION
AND DEVELOPMENTAL DISABILITIES****-AND-****SEIU/DISTRICT 1199****GRIEVANT: Kathleen M. Kolitsos
GRIEVANCE NO: 24-15-060228-007-02-11**

ARBITRATOR'S OPINION AND AWARD**ARBITRATOR: DAVID M. PINCUS****DATE: MARCH 26, 2007****APPEARANCES****For the Employer****Linda Diana
Howard Merritt
Matt Banal
Donna Haynes****Director of Nursing
Operations Director
Labor Relations Specialist (OCB)
Advocate****For the Union****Kathleen M. Kolitsos
Mark Poznor
Jim Tudas
Mary Ann Hupp****Grievant
Delegate
State Coordinator/Second Chair
Advocate**

INTRODUCTION

This is a proceeding pursuant to a grievance procedure in the negotiated Agreement (Joint Exhibit 1) between the State of Ohio, Ohio Department of Mental Retardation and Developmental Disabilities (hereinafter referred to as the Employer) and SEIU/District 1199 (hereinafter referred to as the Union) for the period 2003-2006. The Arbitration hearing was held on January 18, 2007. The parties agreed to provide written closing statements in accordance with guidelines established at the arbitration hearing.

STIPULATED ISSUE

Did the management staff of Youngstown Developmental Center Violate Ms. Kolitsos contractual right to full time employment and if so, what shall the remedy be?

PERTINENT CONTRACT PROVISIONS

ARTICLE 5 - MANAGEMENT RIGHTS

Except to the extent modified by this Agreement, the Employer reserves, exclusively, all of the inherent rights and authority to manage and operate its facilities and programs. The exclusive rights and authority of management include specifically, but are not limited to, the rights expressed in Section 4117.08(C)(1)-(9) of the Ohio Revised Code, and the determination of the location and number of facilities; the determination and management of its facilities, equipment, operations, programs and services; the determination and promulgation of the standards of quality and work performance to be maintained; the determination of the management organization, including selection, retention and promotion to positions not within the scope of this Agreement; the

determination of the need and use of contractual services; and the ability to take all necessary and specific actions during emergency operational situations. Management will not discriminate against any employee in the exercise of these rights or for the purpose of invalidating any contract provision.

(Joint Exhibit 1, Pg. 9)

ARTICLE 24 - HOURS OF WORK AND OVERTIME

xxx

24.16 Shift and Assignment Openings

Shift and assignment openings shall be filled by the qualified employee within the classification at the worksite having the greatest state seniority who desires the opening.

xxx

(Joint Exhibit 1, Pg. 64)

ARTICLE 27 - EMPLOYEE STATUS

27.01 Full Time

A full-time employee is an employee who regularly works forty (40) hours per week and 2080 hours per calendar year.

27.02 Part-Time

A part-time employee is an employee who regularly works less than forty (40) hours per week. The agency shall not use part-time employees to avoid full-time benefits.

xxx

(Joint Exhibit 1, Pg. 70)

CASE HISTORY

Youngstown Developmental Center, the Employer, houses 120 individuals with mental retardation and developmental disabilities. These individuals function in the profound range of mental retardation and also exhibit medical and motor deficits.

On December 12, 1993, Kathleen Kolitsos, the Grievant was hired as a part-time Psychiatric/MR Nurse. This status allowed the Employer to schedule her anywhere from 0-40 hours per week.

In May of 1995, the Grievant contacted Linda Diana, the Director of Nursing, and informed her she wished to permanently reduce her hours of work to 8 hours per week. It appears the Employer attempted to comply with this request when reasonably possible.

This adjusted schedule continued until March 13, 1996. Ronald Britt, the Personnel Director, sent the Grievant a letter which amended the scheduling practice in effect. Britt noted the Grievant would be scheduled and/or called for more hours commencing April 14, 1996. He justified the change based on operational needs in the nursing department, and fairness to other members of the bargaining unit (Joint Exhibit 4(a)).

On May 21, 1996, the Grievant sent an interoffice memo to Diana. The Grievant, again, complained about the increase in hours. She also indicated she wished to take a week of vacation time by using only 8 hours of accrued leave.

A full-time Psychiatric/MR Nurse position was posted on May 9, 2005. The Grievant expressed interest in the position, but Britt informed her that the Employer was exploring other options. Britt stated the Employer was going to post and advertise for a full-time LPN position. Once the selection process had been completed, the Employer would then decide whether to repost the Psychiatric/MR Nurse position (Joint Exhibit 4(b)).

On January 4, 2006, the Employer received an Arbitrator's award (Grievance no. 24-15-102604-864-01-11 dealing with rotating shifts. While the Employer attempted to adjust its assignment/scheduling process, Cindy Tepsick requested to have her appointment type changed from full-time to part-time (Joint Exhibit 4 (C)). The Employer accommodated the request as it developed a new schedule. Tepsick's position was converted to two part-time positions. Tepsick would fill the position on first shift, while the other part-time position would be assigned to the second shift. The second shift assignment resulted in three part-time vacancies on this shift (Joint Exhibit 4 (D)).

On February 3, 2006, the Grievant sent Diana a letter formally requesting a full-time position. She felt that a full-time, second shift position was vacated

when Tepsick's status was changed. The Grievant noted she had worked "full-time hours" for the past year, while two other nurses had been working more hours than originally requested and more hours than agreed to at the time they were hired.

A grievance resulted on February 28, 2006 when the Employer did not comply with the Grievant's request. The Statement of Grievance contained the following relevant particulars:

xxx

Continued use of part-time RN's to avoid paying full-time benefits. In February 2006, it was determined that the agency refuses to fill a full-time position vacated by C. Tepsick RN in January 2006.

xxx

(Joint Exhibit 2(a))

The parties were unable to resolve the disputed matter. Neither party raised substantive nor procedural arbitrability concerns. As such, the grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Union's Position

The Union opined the Employer violated Section 27.02 by staffing the Center with a disproportionate number of part-time Psychiatric/MR Nurses to

avoid full-time benefits. This scheduling practice prevented the Grievant from achieving full-time status and fill a vacancy on the second shift.

The Employer's policy was pervasive and consistent. It encompassed selection determinations and filling of vacancies. Not one Psychiatric/MR Nurse hired in 2006 was hired as a full-time nurse (Joint Exhibit 6 (a)). When Tepsick and Trinckes vacated their full-time positions, neither position was replaced with a full-time replacement.

Staffing in the manner depicted is not supported by recruitment and retention purposes. In 2006, eight (8) Psychiatric/RN Nurses were hired with four (4) being retained. This strategy has not proved effective to accommodate recruitment and retention (Joint Exhibit 6 (a)).

Arbitrator Stein's decision (#24-15-20041026-8464-02-11) eliminated the swing-shift scheduling practice, which caused the Employer to modify its position. Part-time nurses have been asked to volunteer an increased number of additional hours on other shifts to cover staffing needs.

Nursing schedules (Joint Exhibits 3 (A), (B)) further support the Employer's scheduling strategy. Granted, the Employer required more staffing on the 3-11 p.m. shifts, but this circumstance required more than three full-time

nursing positions. Thus, the Employer must reconcile the full-time and part-time positions. The present pull and move of part-time employees violates the spirit of Arbitrator Stein's Award (#24-15-102604-864-01-11).

The Grievant, on several occasions, has requested full-time status but these requests have either been denied or ignored. As such, she accepted additional hours on shifts other than her own, and helped the Employer meet its' operational needs.

The Employer's Position

The Employer maintained that it did not violate Section 27.02. The Grievant is a part-time employee who has received all benefits enumerated in the Agreement (Joint Exhibit 1).

The Grievant's numerous communications merely indicate she wanted to be accommodated under her own defined restrictions. In fact, she noted she wanted a full-time position as long as it was on second shift, while there was no obvious need. During the time of the disputed matter, a full-time position was posted, but the assignment was not on second shift, so the Grievant failed to bid.

The Grievant should not be granted a full-time position on the second shift merely because the Grievant was scheduled for more time than a normal part-time employee. Over a three year period, the Grievant averaged 24 hours

per week. On most occasions, she has volunteered to work these extra hours on off-shifts when positions were vacant or co-workers requested time-off from work.

Benefit differentials do not support the Grievant's allegations. The Grievant was grandfathered with regard to health- care benefits. Also, the insurance benefit and weekends off justifications are unpersuasive in support of the full-time position. The Employer never refused to post full-time positions to avoid full-time benefits.

The high turnover rate at the facility is not a function of hiring part-time employees. None of the resignations submitted during 2006 reflected part-time status as justification for separation decisions.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony adduced at the hearing, a complete review of the record including pertinent contract provisions and written closings, it is this Arbitrator's opinion that the Employer did not violate Section 27.02. This matter is of special interest as a consequence of the grievance; which the Union clarified at the hearing. It is not a class action initiated by either part-time or full-time nurses challenging the Employer's ability to run the facility by utilizing part-time nurses in the described manner. Rather, the Grievant is attempting to force the Employer to establish a full-time position on second shift to be filled by the

Grievant and no one else. This proposed action, therefore, must be evaluated in terms of specific contract language negotiated by the parties; limitations and obligations mutually agreed to and binding on the parties and Arbitrator.

Reliance on Arbitrator Stein's Award is a bit misplaced. His and this Arbitrator's Opinion and Award both require application of traditional contract construction principles. Arbitrator Stein's ruling, moreover, served as a precursor to presently disputed events. But, here, the critical provision requiring analysis is Section 27.02 rather than Section 24.14. Language and factual differences often lead to divergent outcomes.

This Arbitrator, as the parties mutually agreed to agent, is precluded contractually in Section 7.07 (E)(1) from adding, subtracting from or modifying any of the terms of this Agreement (Joint Exhibit 1). A ruling in the Union's favor would violate Section 27.02, and other bargaining members' potential contractual rights.

When interpreting contractual provisions, it is axiomatic that clear and unambiguous language reflect the parties' clear intent, and therefore, is binding on the parties and Arbitrator. Here, the language in controversy is clear and unambiguous. The sole limitation on the use of part-time employees is that "The agency shall not use part-time employees to avoid full-time benefits." Thus, it becomes the Union's responsibility as the moving party, to establish that this particular incident (Arbitrator's emphasis) was perpetuated in an attempt to avoid

full-time benefits. Recall, this dispute is not a class action but strictly limited to the Grievant's desire to establish a second shift full-time position.

Here, the Union failed to establish the specified "avoidance" exception. The Grievant was grandfathered in terms of health and welfare benefits. Thus, this category of benefits does not serve as a significant differentiation. The Collective Bargaining Agreement (Joint Exhibit 1) does not guarantee additional weekends off for full-time employees, another distinguishing feature requested but unsupported by the record. Finally, life insurance coverage in terms of cost were not sufficiently developed to draw any conclusive avoidance outcome.

A ruling in the Union's favor, moreover, could easily trample other bargaining unit members' contractual rights. Article 20 - Vacancies, Section 30.02 describes in tremendous detail how vacancies are to be filled. There may be other more senior full-time nurses that may hold seniority and other preferences trumping the Grievant's claim. Neither the Employer nor the Union would wish to trample other full-time employees' contractual rights. Seniority and other contractual rights are the foundation for any Union's existence.

The Collective Bargaining Agreement (Joint Exhibit 1) in Section 27.02 states part-time employees are regularly scheduled for less than forty (40) hours per week and articulates the full-time benefit exception. The Grievant was never regularly scheduled in excess of forty (40) hours. All other hours worked were

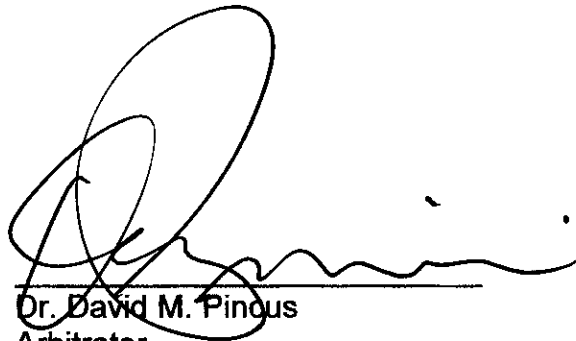
worked voluntarily after being canvassed. There was no contractual violation involving these non-regular hours.

Asking for the disputed remedy appears unrealistic in light of another mitigating circumstance. A full-time position was posted for a non-second shift position. The Grievant chose not to bid on a full-time position because of her second shift preference. If she was so concerned about "benefit" differences, one would think this posting would have satisfied her alleged needs.

AWARD

The grievance is hereby denied. The Employer did not violate Section 27.02 nor any other portion of the Collective Bargaining Agreement (Joint Exhibit 1).

3/26/07
Date


Dr. David M. Pinous
Arbitrator