

## ARonBITRATION PROCEEDING

In the matter of arbitration between:	)	DRC-2018-02610-11
	)	Gr. Tonya Voorhees
STATE OF OHIO, Department of	)	
Rehabilitation and Corrections	)	Hearing: June 19, 2019
	)	at Marysville, Ohio
and	)	
	)	Date of Award:
SEIU DISTRICT 1199	)	August 5, 2019

Before Mitchell B. Goldberg, Arbitrator

## OPINION AND AWARD

Appearances:

For the Union:

Amanda M. Schutte,	Organizer, Attorney
Danielle Brison,	Administrative Organizer
Tonya Voorhees,	Grievant

For the Agency:

Garland Wallace,	Labor Relations Officer III
Tim Reyburn,	Labor Relations Officer II
Victor Dandridge,	Labor Relations Officer - OCB
Karen Maschmeier,	Observer
Erin Maldonado,	Mental Health Administrator
James Adkins,	Labor Relations Officer II

### I. Introduction and Background.

This is a labor arbitration proceeding conducted under the terms and conditions of the parties' Collective Bargaining Agreement ("CBA") covering the term beginning on December 7, 2015 and ending on April 30, 2018. The parties selected the undersigned as the arbitrator of this grievance from the Arbitration Panel in accordance with Section 7.07 of the CBA. The

Union filed a timely grievance on behalf of Tonya Voorhees (“Grievant”), a Psychiatric/DD Nurse employed at the Marysville Correctional Facility known as the Ohio Reformatory for Women, of the Ohio Department of Rehabilitation and Correction. The grievance alleges that the Agency violated Article 24, Section 24.17 of the CBA on June 18, 2018 when the Grievant was pulled from her post in the Outpatient part of the facility’s Mental Health buildings to the location of the Residential Treatment Unit (“RTU”) . The alleged violation occurred when no nursing staff had volunteered for the assignment, and the Agency failed to select the least senior qualified employee for the assignment. The Grievant had more seniority than the Nurse Stevens, who was the least senior nurse available for the selection. The Union requests a make whole remedy that consists of a cease and desist order preventing the Agency from future violations of the seniority provision, and a monetary remedy of 4 hours of pay for the Grievant so that she could perform “catch up work” that she could not perform due to her assignment to the RTU.

The Agency denied the grievance throughout each step and the matter proceeded to arbitration at the Marysville facility on June 19, 2019. There was no transcription of the proceeding or other official record. The parties presented sworn testimony from witnesses and they submitted joint and party documentary exhibits. Witnesses were examined and cross-examined. Post-hearing briefs were filed after all of the evidence was received.

The parties entered into the following stipulations:

1. The grievance is properly before the arbitrator and there are no procedural objections.
2. The Grievant’s date of hire is November 5, 2007
3. The Grievant is currently employed as Psychiatric/DD at Ohio Reformatory for Women (“ORW”).
4. On June 18, 2018, the Grievant was directed to work in the Residential Treatment Unit (“RTU”).

The parties further stipulated to the following issue:

Did the Employer (Agency) violate Article 24.17 when it required the Grievant to work in the RTU? If so, what should the remedy be for the contract violation?

II. Applicable Contract Provisions.

ARTICLE 5 - MANAGEMENT RIGHTS

The Union agrees that all of the functions, rights, powers, responsibilities and authority of the Employer, in regard to the operation of its work and business and the direction of its workforce which the Employer has not specifically abridged, deleted, granted or modified by the express and specific written provision[s] of the Agreement are, and shall remain, exclusively those of the Employer.

Accordingly, the Employer retains the rights to . . . 6) determine the work assignments of its employees . . . .

ARTICLE 24 - HOURS OF WORK AND OVERTIME

24.16 Shift and Assignment Openings

- A. When applicable, shift and assignment openings within institutions shall be filled by the qualified employee within the classification at the worksite having the greatest State seniority who desires the opening.
- B. The Employer retains the right to change an assignment for a rational management purpose, including but not limited to the best interest of the clients, patients, residents, inmates, offenders, or youths.

24.17 Pulling or Movement of Personnel

An employee may be pulled or moved to meet operational needs. The Agency shall designate the work area most able to provide the coverage. The qualified employee in the designated class having the greatest State seniority who desires to be pulled or moved shall be [moved or pulled]. If no employee volunteers to be pulled or moved, the qualified employee in the designated class with the least State seniority shall be pulled or moved first from the work area most able to provide the coverage as determined by management.

### III. Uncontested Facts.

The Outpatient Clinic ("OU") and the RTU are part of the mental health services that are provided to inmates. The mental health services are located in three units that are closely located to each other in separate buildings. There is the Residential Treatment Unit ("RTU"), the Outpatient Unit ("OU"), and the Intake Unit ("IU"). The Grievant is a Psychiatric/DD Nurse specified to work in mental health facilities with patients who need mental health services, or those individuals with developmental disabilities. She assesses, plans, implements, monitors and evaluates medical and psychiatric nursing care for patients. The OU is operated like a doctor's office or clinic. It has fixed daytime hours with patient (inmate) appointments with doctors and nurses. Her specific pay grade for her job classification is 13.

The Grievant bid into an Outpatient Clinic ("OU") position based upon her seniority. She assists the doctors in managing the prescribed medications for patients. She works a Monday-Friday schedule and has off-days on the weekends. She previously worked in the RTU, which operates as an in-patient hospital that treats patients with acute mental health conditions. Officers are stationed at the RTU in order to maintain security because of the high risk conditions. RTU nurses work on a 24-hour basis with 3 workshifts. Both OU nurses and RTU nurses are required to have the same State nursing licenses. The Grievant's position as a Psych/DD and a Nurse I position in the RTU are both paid at a 13 level.

### IV. The Facts Related to the Dispute.

When the RTU becomes short staffed during the first shift (the daytime shift worked by OU nurses), Management will direct an OU nurse to fill-in at the RTU for that day. The evidence shows, based upon the Grievant's testimony, that during her five year OU work period, the least senior OU nurse was directed to fill this operational need in the RTU. First, the least senior OU nurse during the first two years was Nurse Elly Amspaugh. When Nurse Stevens bid into an OU

vacancy, she was the least senior nurse in OU, with less seniority than Nurse Amspauagh.

Thereafter, for the next three years, Nurse Stevens was the nurse directed to work in the RTU to fill a staff shortage.

Nancy Smith, who was working as a temporary supervisor in OU on June 18, 2018 directed the Grievant to work in the RTU for her entire workday. The Grievant objected to the work assignment in the RTU, and advised Nurse Smith about her belief that the least senior nurse in OU should be assigned to the RTU instead of her. She advised supervisor Smith that the least senior OU nurse was Nurse Stevens, and that Nurse Stevens was available to work the assignment. Supervisor Smith, nevertheless assigned the Grievant to RTU for the day.

V. Contract Construction Principles.

The Union must prove that its interpretation of the CBA better reflects the parties' intent when the contract was agreed upon. Its burden of proof, however, is only proof by a preponderance or greater weight of the evidence. The arbitrator must first attempt to find the parties' intent from the written terms and language of the CBA. Unambiguous language must be given its plain meaning. This is derived from the document itself with the use of ordinary dictionary definitions and other well known and accepted rules of contract construction.

Language is unambiguous when the meaning can be determined without more than a review of the facts and the parties' chosen words from the four corners of the agreement. An ambiguity arises when the language is reasonably susceptible to more than one meaning. In those cases, the arbitrator is free to look beyond the document itself and may rely upon extrinsic evidence. This includes evidence of the parties' bargaining history (past contracts), notes and statements made across the bargaining table or during negotiations that led to the final contract. Arbitrators may further apply usages of custom and trade, and the parties' past

practices. But, after the transaction has been shown in all its length and breath, the words of the integrated agreement remain the most important evidence of intention.<sup>1</sup>

V. Positions, Evidence, Analysis and Findings.

*Past Practice As An Aid In Contract Interpretation*

The Agency denies that there is an established past practice of the type contended by the Union where all nurse assignments from the OU to the RTU must be to the least senior nurse at OU, unless more senior nurses have volunteered for the assignment. Past practices may be used in three different situations: (1) to clarify ambiguous contract language; (2) to implement general contract language; or (3) to create a separate, enforceable condition of employment.<sup>2</sup>

I find that except for the possible ambiguity in the meaning of the words “work area” in Section 24.17, the provisions of that article are clear and unambiguous. There is no need to resort to the finding of a controlling past practice that seniority governs the assignment process unless the Agency can show some overriding operational need that would qualify under Section 24.16. The language clearly provides for seniority to control with the stated exceptions. Section 24.17 should be read together with 24.16. All of the words in the Article must be given meaning because contracting parties usually do not insert provisions that are without any meaning. The Agency would need to prove that its decision to assign the Grievant instead of Nurse Stevens (the lowest in seniority) was “for a rational management, purpose [or reason] including but not limited to the best interest of the clients, patients, residents, inmates, offenders, or youths.”

It is the clear and unambiguous language in 24.17 that states that when there are no volunteers to be pulled or moved, the qualified employee with the least State seniority shall be

---

<sup>1</sup> *Restatement (Second) of Contracts*, Section 212, cmt B (1979).

<sup>2</sup> *The Common Law of the Workplace, The Views of Arbitrators*, 2nd Ed., NAA, Theodore J. St. Antoine, Editor, Section 2.20, p.89 (2005).

pulled or moved from one work area to the needed coverage area. The decision as to whether an employee is a qualified employee is determined by management. It is not necessary to invoke the evidence based practice as testified to by the Grievant, when the practise conforms with the express provisions of Section 24.17. The practice supports the clear and unambiguous language of 24.17 as the agreed method of providing the selection. The Grievant testified that she observed that the least senior nurse in OU was always selected for RTU duties when there was a need during the day shift. This occurred on multiple occasions and her testimony was confirmed to some extent by Labor Relations Officer Adkins. He testified that he considered assigning Nurse Stevens (the least senior nurse), but she was falling behind in her regular workload, so he picked the Grievant for the needed RTU assignment. He did not contradict the Grievant's testimony that the two less senior OU nurses were selected during the Grievant's 5 year tenure. Instead, he justified his decision as a rationale management purpose as set forth in Section 24.16, and management's operational needs as set forth in 24.17..

I find that the Union met its burden to prove that seniority controlled management's decision to the extent that Nurse Stevens should have been selected for the assignment as set forth under 24.17. However, the Agency defended the Grievant's assignment by exercising its right to change the 24.17 assignment "for a rational management purpose." The burden shifts to management to justify the application of the exception to the seniority based selection process. One must then determine whether the Agency met its burden to prove that its decision was a rational one, and not an arbitrary one.

I cannot find persuasive evidence on this record that the Agency's decision in this one isolated case somehow materially affected "the best interest of the clients, patients, residents, inmates, offenders, or youths." Both the Grievant and Stevens were qualified to work in RTU and had worked there in the past either as volunteers or as assigned. There is no evidence

supporting a conclusion that the interest of the parties and others were compromised by the selection of either nurse. The only basis for the decision, as explained by Mr. Adkins, was that Nurse Stevens had fallen behind in her regular work, and that he preferred that she catch up with her regular work instead of working in the RTU. There was no evidence that this opportunity for Nurse Stevens to catch up with her work was some workplace necessity, significant enough to override the intent of 24.17 to apply seniority and select Nurse Stevens as the least senior nurse to provide the needed coverage in RTU. One could assume that one reason why Nurse Stevens was unable to keep up with her regular duties, was because she was the least senior nurse and she was the first nurse who was repeatedly selected for reassignments.

One must focus on the language of 24.16B and the operational needs language in 24.17 in order to determine whether management's purpose in assigning the Grievant instead of Nurse Stevens was contractually permissible. If it was not based upon reasonable facts and evidence, the decision would be an arbitrary one. An arbitrary decision is one based upon prejudice or preference rather than on reason or fact.<sup>3</sup> The entire language in Article 24 provides aid and guidance as to what a rationale management purpose would be in these circumstances. One contract interpretation maxim is that words in the same series should be given the meaning that is given to the other words in the same series (*ocius a sociis*).<sup>4</sup> In this case, a rational management purpose includes, but is not limited to a decision that is in the best interest of the clients, patients, residents, inmates, offenders, or youths.

The evidence does not support a finding that Mr. Adkins' decision and reasoning falls within these parameters as having a material impact on these interests, sufficient enough to disregard the clear mandate that seniority should normally govern these assignments as clearly

---

<sup>3</sup> Black's Law Dictionary, 8th Ed., Bryan A. Garner, Editor-in-Chief, Thomson-West, p.112 (2004).

<sup>4</sup> *Common Law*, Section 2.17 at p.77.



expressed in 24.17. It must be understood that the least senior nurse in OU would ordinarily be selected for RTU assignments during the day shift when there are no other volunteers. This has been the accepted (by practice) way of doing things. In such cases the less senior nurse's regular assignments will be more impacted than the regular assignments of more senior nurses who are not selected for this move. There is no stated workload equalization standard that must be applied by CBA directives that would avoid the burden placed upon the least senior OU nurse and her regular duties. The intent of 24.17 is to place whatever burden is created by the removal of an OU nurse to RTU upon the least senior nurse if there are no other volunteers. The exception exists, however, if it can be shown that the selection of a more senior nurse in any particular fact scenario is more beneficial because of some overriding management interest or purpose. In that exceptional case, the senior nurse must bear the burden because the interests of clients and others are adversely affected by the selection of the least senior nurse. No persuasive evidence was presented to make that case in this record. It could very well be that the repeated selection of Nurse Stevens caused her to fall behind in her regular duties, but if so, Section 24.17 takes this into account by placing this workload burden upon the least senior nurse, instead of more senior nurses when there are no volunteers.

The Agency points to Mr. Adkins' testimony that on several occasions during his tenure he selected more senior nurses for assignments to RTU. However, he did not elaborate on whether the particular assignments were accepted by the more senior nurses, or whether they volunteered for the assignment. He did not explain the facts or the nature of the particular operational reasons that supported his decisions in these several cases. His belief, however, that he had full discretion to make these decisions in accordance with his interpretation of Article 24 is contradicted by the clear and unambiguous constraint upon his decision-making process.

Likewise, witness Maldonado, the Mental Health Administrator, testified that she reassigns psychiatric/DD nurses within the mental health area “for good management reasons.” This testimony merely acknowledges her right to make these decisions under Article 24. This matter, however, involves one particular instance when the Grievant was assigned to RTU over her objection when a less senior nurse was available.

Her testimony and the other evidence does not support a finding that some overriding “good management reason,” or some general need to have flexibility for assignments was present in this case to justify the avoidance of the seniority based requirement that the least senior employee should be selected. She testified that there are certain situations when it is not reasonable to select the least senior nurse, such as when a particular nurse regularly works with a specific clinicians and it is not reasonable to break up that relationship. However, the evidence in this case does not support that type of situation. Instead, the facts and evidence warrant a finding that no such special circumstances existed as between Nurse Stevens and the Grievant on June 18, 2018 when this assignment or pull was made.

#### *The Definition of “Work Area”*

Arbitrator Elliott Goldstein addressed this subject in his Award in an arbitration between the State of Ohio and another Union. He stated that “the parties” were in agreement that the term “work area” meant “the physical setting within which an employee performs his or her assigned work on a regular basis.” He described the general question to resolve: “How broad or narrow” should the physical setting be?<sup>5</sup> He went on to find that for the four agencies in question, the work area must be defined “as the smallest subdivision of the regular work

---

<sup>5</sup> Goldstein Award, p. 9.

assignment in the physical setting where an employee performs his or her assigned work on a regular basis.”<sup>6</sup> This definition provides guidance in determining the issue in this matter. The issue is whether the work area should be defined to include all three departments as one work area, within which assignments and reassignments can be made, or whether each individual department should be considered a separate work area for purposes of making reassignments, or temporary reassignments under Article 24, based upon shortages in personnel at any one of the departments.

Mental Health Administrator Maldonado testified that all of the mental health services are concentrated within the Marysville facility. The three components are (1) the Reception or Intake Unit, (2) the Outpatient Unit, and (3) the Residential Treatment Unit. She stated that the Nurse 1 nurses, referred to as “Medical Nurses” are located in the RTU or the Infirmary. The Psychiatric/DD nurses are located in the OU and focus on the provision of mental health medications. The Nurse 1s are located in the RTU where they provide direct care for the resident patients. While Psych/DD nurses are able to perform Nurse 1 duties when called to fill-in for a shortage during their day shift, their regular duties are different from Nurse 1s as described in their position descriptions. Both types of nurses are located in the Department of Rehabilitation & Correction, and both are within the User Group that includes the three units, but they are separate units.

While the nurses are cross-trained, the units have different work schedules. The evidence shows that Psych/DD nurses periodically are assigned to the RTU to cover personnel shortages, but there is no evidence that Nurse 1s from the RTU are ever called to work in OU when there is an OU shortage. There is no evidence that Psych/DD nurses or Nurse 1s from the RTU are assigned to fill-in at the Reception Unit during their day work shifts.

---

<sup>6</sup> Id. at p.68.

The weight of the evidence in this record supports the finding that the OU and RTU are separate work areas that are involved with the delivery of Mental Health Services in the Marysville Facility. The reassignments of OUs to RTU occur after the OU Psych/DD nurse reports for duty at their regular OU area, at their regular starting time on scheduled day shifts. They sometimes are called upon to fill-in at the RTU area that operates on a 24-hour - 3 shift basis. Their reassignments can only be made during the OU day shift. The more reasonable interpretation of the term "work area" based upon the evidence in this record is that there are three distinct units or separate work areas under the language and meaning of Article 24.

VI. Award.

The grievance is sustained to the extent that the Agency must cease and desist from reassigning Psych/DD nurses to fill-in at the RTU other than by first selecting the least senior Psych/DD nurse on duty, when there are no volunteers. More senior nurses may be selected over the least senior in situations or circumstances when operational needs control the assignment or when there is a rational management purpose as defined by Article 24.16B. Such reassignments shall not be assigned to more senior Psych/DD nurses in cases where the reason for the reassignment is to equalize or adjust the relative workloads of the Psych/DD nurses.

The remedy sought by the Union in the grievance for lost pay amounting to four OU catch-up work hours that were not performed by the nursing staff while the Grievant was pulled to RTU is denied. There is no evidence of any measurable economic damages to the Grievant or to the Union as a proximate result of the Agency's contract violation of Article 24, Section 24.17.

Date of Award: August 5, 2019

Mitchell B. Goldberg

Mitchell B. Goldberg, Arbitrator

CERTIFICATE OF SERVICE

This Opinion and Award was served upon the following persons on this \_\_\_ day of August, 2019 by electronic mail:

Victor Dandridge, [victor.dandridge@das.ohio.gov](mailto:victor.dandridge@das.ohio.gov)

Amanda M. Schulte, [aschulte@seiu1199.org](mailto:aschulte@seiu1199.org)

Danielle Brison, [DBrison@SEIU1199.org](mailto:DBrison@SEIU1199.org)

Cassandra Richards, [cassandra.richards@das.ohio.gov](mailto:cassandra.richards@das.ohio.gov).

*Mitchell B. Goldberg*

Mitchell B. Goldberg